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THE SCIENCE OF JURISPRUDENCE

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THE SCIENCE OF JURISPRUDENCE

A TREATISE

IN WHICH THE GROWTH OF POSITIVE LAW IS UNFOLDED
BY THE HISTORICAL METHOD AND ITS ELEMENTS
CLASSIFIED AND DEFINED BY THE ANALYTICAL

BY

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"The Science of Jurisprudence is concerned with positive laws,
or with laws strictly so-called, as considered without regard to
their goodness or badness." — AUSTIN.

"Adhibita est igitur ars quaedam extrinsecus ex alio genere
quodam; quod sibi totum philosophi adsumunt, quae rem dis-
solutam divolsamque conglutinaret et ratione quadam con-
stringeret." — CICERO.

New York

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To
THE RIGHT HONORABLE JAMES BRYCE
AND
THOMAS ERSKINE HOLLAND, K.C.
MASTERS OF THE SCIENCE OF JURISPRUDENCE
THIS BOOK IS INSCRIBED

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PREFACE

THE group of scholars who founded something more than a century ago the science now known as Comparative Philology revolutionized the thought of the world not so much through the marvelous revelations of that science as by the discovery of the new method of investigation that made such revelations possible. Out of the application of the new method to fresh subject-matters have since arisen Comparative Mythology, Comparative Politics, and Comparative Law. By the aid of the two sciences last named a flood of light has been shed upon the processes through which the aggregate, generally known as government and law, emerged from progressive history in the nations that have made the deepest impress upon civilization.

The most important single outcome of Comparative Politics — which may be called the science of state building, the science of constitutions — is embodied in the discovery that the only two conceptions of the state known to the ancient and modern world have been and are represented by aggregations or federations in which the starting point was the village community. (The unit of state organization, from Ireland to Hindostan, was the naturally organized association of kindred; the family swelled into the clan which, in a settled state, assumed the form of the village community represented, in a general way, by the *γένος* of Athens, the *gens* of Rome, the *mir* of Russia, the clan of Ireland, the *mark* or *gemeinde* of the Teutonic nations which appeared in Britain as the *tun* or township.) When we turn to the Medi-

terranean world in which the Science of Politics was born, we there find that the ancient conception of the state as the city-commonwealth was the product of aggregations in which the village community was the unit or starting point. In Greece the first stage in the aggregation is represented by the gathering of a group of village communities or clans into a brotherhood (*φρατρία*); the second by the gathering of *φρατρίαι* into a tribe; the last by the gathering of tribes into a city-state. In Italy the village community appears as the *gens*. Out of the union of *gentes* arose the *curia*; out of the union of *curiae* arose the tribe; out of the union of tribes arose the city-state. (It was upon the soil of Italy that a group of village communities grew into a single independent city-state that centralized within its walls the political power of the world. Out of the settlements made by the Teutonic nations upon the wreck of the Roman Empire has gradually arisen the modern conception of the state as a nation occupying a definite area of territory with fixed geographical boundaries, — the state as known to modern international law.) The homogeneous race called Teutonic was broken up into an endless number of political communities or tribes which stood to each other in a state of complete political isolation, except when united in temporary confederacies. The typical Teutonic tribe — the *civitas* of Caesar and Tacitus — represented an aggregation of hundreds; while the hundreds represented an aggregation of village communities. The parallel between the Teutonic, the Greek, and the Latin tribe seems to be complete. The *γένος*, the *gens*, the *mark*, represent the same thing, the village community; while the *φρατρία*, the *curia*, the hundred, seem to represent the same thing, a group or union of village communities. Out of the aggregation of such indeterminate groups or hundreds arose the tribe itself. But here the parallel ceases. In the Mediterranean peninsulas

the resultant of a union of tribes was the city-state; in Teutonic lands the resultant of a union of tribes was not a city at all but a nation. When we turn to the existing European state system, built up in the main out of the fragments of the empire of Charles the Great, we there find that the modern conception of the state as a nation is the product of aggregations in which the village community is the unit or starting point. The typical modern state in Britain, known as England, represents an aggregation of shires; each shire an aggregation of hundreds; each hundred an aggregation of village communities or townships. The power to subdue and settle a new country, and then to build up a state by this process of aggregation constitutes the strength of the English nation as a colonizing nation. By that process, capable under favorable geographical conditions of unlimited expansion, has been built up the federal republic of the United States. As Tocqueville has expressed it: "In America . . . it may be said that the township was organized before the county, the county before the State, the State before the Union." After thus unfolding the origin and growth of the political constitutions of states, ancient and modern, Comparative Politics has undertaken to classify and label such constitutions as buildings and animals are classified and labeled by those to whom buildings and animals are objects of study. Students of Comparative Politics and students of Comparative Anatomy, beginning with the incomplete data embodied in traces and survivals, supply the deficiencies and work out results through substantially the same process of reasoning.

Not until the history of the outer shells or constitutions of states had been thus subjected to critical examination at the hands of Comparative Politics, did Comparative Law undertake to unfold the history of such bodies of interior or private law as have existed as distinct codes. The outcome

is the discovery that the world has so far produced only five distinct systems of law: (1) the Roman; (2) the English; (3) the Muhammedan; (4) the Hindoo; (5) the Chinese. An attempt has been made to indicate the limits of the several geographical areas to which each is confined. By that survey the fact is established that about nine tenths of the civilized world is now dominated by Roman and English law, in not very unequal proportions. It thus appears that the student of the Science of Jurisprudence, as defined herein, is directly concerned only with Roman and English law, from whose histories are to be drawn practically the entire data with which he has to deal. For that reason, in the central chapters of this work, entitled respectively "The External History of Roman Law" and "The External History of English Law," an effort has been made to outline, as progressive and unbroken developments, first, the growth of the code that grew out of the primitive customs of the great Italian city; second, the growth of the code that grew out of the primitive customs of that group of Teutonic tribes which founded in Britain the English commonwealth. When the external histories of these two world codes are thus unfolded, side by side, the coincidences, the likenesses are striking indeed. Each consisted at the outset of a body of customary law which became rigid and unelastic the moment it was reduced to written formulas. Long after that stage was reached each state grew into a world power with vast territorial dependencies. Thus each state was forced so to expand its meager and unelastic code of archaic law as to meet the manifold and ever changing conditions of the aftergrowth. That result was worked out in each by identically the same agencies — legal fictions, equity, and legislation. Each state as it advanced manifested its conservatism by promoting law reform mainly through the agency of judge-made law, — the Roman *responsa* and the English

case-law system presenting parallel processes of innovation in existing rules, made only after exhaustive discussion as to particular deficiencies revealed by the facts of individual cases. As old institutions became obsolete they were, as a general rule, permitted simply to die out, without formal abrogation. Thus at Rome as in England out of the old was slowly evolved, bit by bit, the new. There is, however, an utter lack of similarity between the two world systems of positive law when antiquity, fullness, and philosophical completeness are taken into account. So far as antiquity is concerned Roman law, after a thousand years of historic growth, had passed into the second stage of codification before the Teutonic conquest and settlement of Britain was fairly begun. Ethelbert had ruled the men of Kent only some five years in 565, when Justinian died. And yet in thinking of any possible influence of Roman forms and institutions in England prior to the Norman Conquest, there can be no question of Justinian's *Corpus Juris*, which was as such still a new thing in the Eastern Empire itself at the time of Augustine's mission to Kent. How the Teutonic state that arose in Britain, known as England, was affected in later times by successive infusions of Roman law will be indicated hereafter.

The lost text of Gaius, which has shed great light on portions of the history of Roman law previously most obscure, was discovered at Verona in 1816 by the historian Niebuhr, just at the moment when the founders of the historical school of jurisprudence were beginning to assert their influence. Niebuhr communicated the fact to Savigny, who pointed to Gaius as the real author. He, as well as his immediate followers, dealt only with Roman materials. The founder, or rather consolidator of the historical school, applied that method only in a very limited way to the general theory of politics. When in 1803 Savigny published his *Das Recht des Besitzes*, or the right of possession, jurists perceived that the

old uncritical study of Roman law was at an end. Instead of considering law as the creation of the will of individuals, Savigny maintained it to be the natural outcome of the consciousness of the people, like their social history or their language. In his *Geschichte des Römischen Rechts*, the first volume of which appeared in 1815, is embodied an emphatic protest against the habit of viewing the law of a nation as an arbitrary creation, not connected with its history and condition. In his famous pamphlet (*Beruf unserer Zeit*), published the year before, he expressed the then new idea that law is a part and parcel of national life. Down to that time comparative investigation of archaic legal systems had scarcely been undertaken at all, certainly not on any considerable scale. The almost unbroken soil of that rich and inviting field was to be turned over by the plow of one who revealed wonders. Sir Henry Sumner Maine, whose *Ancient Law* appeared in 1861, said in his preface that — “The chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in ancient law, and to point out the relation of those ideas to modern thought.” In the masterly demonstration that followed he showed that legal ideas and institutions have a real course of development as much as the genera and species of living creatures; that they cannot be treated as mere incidents in the general history of the societies where they occur. The works of these epoch-making men, the one German, the other English, have resulted in the creation of what may be called the natural history of law. But long before the advent of Maine the torch lighted in Germany by the historical school of jurisprudence had passed into England by the hand of John Mitchell Kemble. He was the real path breaker into the jungle of early English institutional history. To him belongs the imperishable honor of being the first to bring to light the most valuable of the early records, and to apply to

their interpretation the rich results of German research into the childhood of the whole Teutonic race. After studying under the brothers Grimm at Göttingen, Kemble was the first to reject every suggestion of Roman influence at the outset, and to perceive clearly the all-important fact, now generally admitted, that the national life of the English people, both natural and political, began with the coming of the Teutonic invaders who, during the fifth and sixth centuries, transferred from the continent into Britain their entire scheme of barbaric life. The historians who have enlarged and refined upon his work have put it beyond all question that the German element is the paternal element in the English system, natural and political. The Roman elements which have been since absorbed, whether by conscious adaptation or otherwise, *ab extra*, are not of the essence of the system, however largely they may have entered into the private law side of it. Specialists who have followed Kemble have devoted themselves rather to English institutional history than to that of private law for the obvious reason that of the two it is by far the most distinctive and far-reaching in its influence. An exception must, however, be made in favor of Pollock and Maitland's *History of English Law*, whose excellence is universally recognized.

Emphasis has been given at the proper place to the fact that the public law of Rome, constitutional and administrative, was rejected because inapplicable to the new conditions that arose when the state system of modern Europe, in which the state as the nation is the unit, swept away and superseded the ancient state system in which the city-commonwealth had been the unit. What did survive was the private civil law of family and property, of contract and tort, based on principles of natural equity and universal reason which have not lost their force with the altered circumstances of more recent times. It is that system of Roman private law

which became the basis of the codes of the Continental nations, whence it passed into Mexico, Central and South America, to certain states in South Africa, as well as to Scotland and Louisiana. On the other hand, it is the public law of England that has had the widest extension, and is exercising by far the most potent influence by reason of the fact that the English constitutional system stands out as the accepted political model after which have been fashioned the many systems of popular government now existing throughout the world. Since the beginning of the French Revolution nearly all the states of Continental Europe have organized national assemblies after the model of the English Parliament in a spirit of conscious imitation. Not, however, until the typical English national assembly, embodying what is generally known as the bicameral system, had been popularized by the founders of the federal republic of the United States, was it copied into the Continental European constitutions. Nothing is more interesting in the institutional history of the world than the approaches now being made to the constitutional system of the United States by Mexico and the states of Central and South America. In some instances in Latin America single states approach very closely, so far as their constitutional law is concerned, to the English original as modified by American innovations; in others, federal states are organized on the American plan, with certain reservations. But no matter to what extent a Mexican, Central, or South American state may adopt English constitutional law in the structure of its outer shell, its interior code of private law is invariably Roman,—a fact equally true of every Continental European state whose constitution has been founded on the English model. Jurists who view the existing state system of the world as a connected whole cannot fail to perceive, when their attention is specially directed to the subject, that, within a century, in the blending of Roman

and English law there has occurred a phenomenon that marks a turning point in the history of legal development. After centuries of growth Roman public law, constitutional and administrative, perished, leaving behind it the inner part, the private law, largely judge-made, which lives on as an immortality and universality, — as the fittest it survives. In the same way and for the same reason English public law, the distinctive and least alloyed part of that system, is living on and expanding as the one accepted model of popular government. The phenomenon in question is presented by the blending now going on between the strongest elements of Roman and English law in the state systems of Continental Europe, in those of Latin America, and in that of the state of Louisiana. If the existing state system of France is taken as a typical illustration, we there find the outer shell of the state, the system of parliamentary government, to be purely English through deliberate and recent imitation, while the interior code of private law is essentially Roman. The same thing may be said of every other Continental European state having a parliamentary government. In the state system of Louisiana we find the outer shell of the state to be English, as modified by American innovations, while the interior private law is based on the Code Napoléon. The same thing is true of the seventeen Latin-American republics which have adopted English constitutions in the North American form, while retaining the private law drawn from Roman sources. Is it not therefore manifest that out of this blending of Roman and English law there is rapidly arising a typical state-law system whose outer shell is English public law, including jury trials in criminal cases, and whose interior code is Roman private law? This far-reaching generalization, now submitted to the consideration of students of the Science of Jurisprudence for the first time, so far as the author knows, has been subjected in advance to the searching and approving

criticism of a few of the most eminent jurists of the English-speaking world.

The representative systems that sprang up as a part of the constitutional machinery of the several provincial states founded by English settlers upon American soil were in no proper sense the result of imitation. Like the states themselves of which they were a part, they were the predestined product of a national process of reproduction. The constitutional history of these provincial states does not begin with the landing of the English in America in the seventeenth century, but with the landing of the English in Britain in the fifth. When, after the severance of the tie that bound these provincial states to the mother country, the time came for them to confederate, they simply reproduced the ancient type of a federal union as then existing between the Low-Dutch communities at the mouth of the Rhine, and between the High-Dutch communities in the mountains of Switzerland, and upon the plains of Germany. The fundamental principle underlying all such fabrics was the requisition system, under which the federal head was simply endowed with the power to make requisitions for men and money upon the states or cities composing the league for federal purposes, while the states alone, in their corporate capacity, possessed the power to execute and enforce them. In their first effort American statesmen exhibited no fertility of resource whatever in the making of federal constitutions. The first fabric simply embodied the very old story of a confederation with the entire federal power vested in a single assembly, without an executive head, and without a judiciary. In 1787 — eleven years after the drafting of the first federal constitution, which proved to be a failure — the world was startled by the announcement that a second had been drafted, embodying a radical departure from all preceding experiments. As Tocqueville has expressed it:

"This constitution, which may at first be confounded with federal constitutions that have preceded it, rests in truth upon a wholly novel theory which may be considered a great discovery in modern political science." As the second constitution has no prototype in history, Gladstone made no mistake when he declared it to be "the most wonderful work ever struck off at a given time by the brain and purpose of man." No other viable constitution was ever so distinctly an invention; its basic principles were discovered suddenly by some man or by some body of men. And yet, despite that fact, there has been no curiosity to discover who was the real inventor of the greatest of inventions. The popular and uncritical idea has been that, in some mysterious way, the invention was made as a composite work by the leaders who sat in the Federal Convention during the 125 days that intervened between May 14 and September 17, 1787. The impossibility of that nebulous theory is manifest the moment we remember it is admitted, on all hands, that the finished product was the outcome of four kindred "plans" — each embodying the basic principles of the great invention — which were carefully formulated sometime beforehand. We know that Madison, the draftsman of the most important of the "plans," was at work upon it at least a year before the Convention met. The question is therefore inevitable — From what common source did the draftsmen of the four "plans" draw the path-breaking invention which was the foundation of all of them? Let it be said to the honor of those draftsmen that no one of them ever claimed to be the author of that invention. Neither Madison, nor Charles Pinckney, nor Sherman, nor Ellsworth, nor Hamilton, nor any of their biographers, ever put forward such a claim in behalf of any one of them. There is now no excuse for doubt upon the subject, as the complete and conclusive evidence is contained in a single document, as authentic as the Constitu-

*Federal
Convention
date*

tion itself, published at Philadelphia, February 16, 1783, by Pelatiah Webster, who claimed at the time the invention as his own. As early as 1781 he perceived that the first federal constitution was a failure. Then it was, as Madison tells us, that he proposed the calling of a "Continental Convention" for the purpose of making a new one. Webster says in express terms that he was fully of opinion "that it would be ten times easier to form a new constitution than to mend the old one." In that frame of mind the great one set himself to work to create an entirely new and unique federal system which should supersede the first constitution of 1776. In his epoch-making paper, published more than four years before the Federal Convention of 1787 met, he propounded to the world, as "the original thoughts of a private individual, dictated by the nature of the subject only," the four novel and basic principles upon which the great creation now reposes:—

(1) The principle of a federal government operating directly on the individual, instead of upon the states as corporations; (2) the division of a federal government into three departments—legislative, executive, and judicial; (3) the division of a federal legislature into two chambers on the bicameral plan; (4) a federal government with delegated powers, the residuum of power remaining in the states. For some years before they began their work the draftsmen of the four "plans" held in their hands the text of the great invention, which passed through such "plans," as conduits, into the existing Constitution of the United States. Those who shall hereafter strive to take away from Pelatiah Webster the honor of having made this free and priceless gift to the country that has for so long a time neglected and forgotten him must be prepared to meet the concrete issue of historical fact involved,—they must be prepared to name some particular man who announced some one of the four

basic principles in question, *prior to February 16, 1783*. If that cannot be done, the cavilers must forever hold their peace. The puerile argument that a great many people were thinking about such things about that time fails to meet the issue at all. As it has been the good fortune of the author to unearth this epoch-making document and to place it in its proper light, it is printed as an appendix to this work so that students of the Science of Politics everywhere may see for themselves the tentative form in which appeared an invention that has revolutionized federal government throughout the world.

Not until Comparative Politics and Comparative Law had collected the data was it possible to draw from them the set of principles constituting the Science of Jurisprudence, whose function it is to extract from the mass of detail, embodied in the several existing systems of positive law, the comparatively few and simple basic legal conceptions that underlie them all. Or, as Austin has expressed it, "The proper subject of general or universal Jurisprudence is a description of such subjects and ends of laws as are common to all systems, and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in these several portions." As the science of positive law is a Roman creation, Jurisprudence a Roman invention, we must, according to the Historical Method, begin with an examination of the actual conditions at Rome out of which the science in question arose, in order to illustrate by the facts of history the nature of the processes through which it works out its results. An effort will be made hereafter to demonstrate that Rome's relation to commerce caused an influx of foreigners whose need of law compelled, as early as 242 B.C., the appointment of a *praetor peregrinus*, whose duty it became to administer justice between Roman citizens and foreigners and between citizens of

different cities within the Empire. As such praetor could not rely upon the law of any one city for the criteria of his judgments, he naturally turned his eyes to the codes of all the cities from which came the swarm of litigants before him. Thus we encounter what is perhaps the earliest application of Comparative Law, employed for the purpose of extracting from the codes of all the nations with which the Romans were brought into commercial contact a body of principles afterwards known as the *jus gentium*, the law common to all nations. With the growth of the dominion of Rome and the consequent necessity for the extension of the code of a single city to many cities, there was a natural craving for the discovery of legal principles capable of universal application. In response to such a demand Comparative Law collected the data, and a certain branch of Greek philosophy supplied the theory upon which they could be worked into a consistent whole. Such was the origin and such the nature of the first set of principles which can be said to embody a philosophy of law. As such principles were the result of generalizations upon elements common to the laws of all nations, their existence was supposed to indicate a similarity in the needs and legal conceptions of all peoples. The philosophic element was the Stoic conception of a law of nature, a universal code from which all particular systems were supposed to be derived and to which all tended to assimilate.

If it be true that the Science of Jurisprudence is directly and practically concerned only with the data to be drawn from the histories of Roman and English law, investigation need not be extended beyond the areas in which these two systems exist, singly or in combination. The effort has been made herein to outline, by the aid of the Historical Method, the growth of law, public and private, within such areas. Not until the synthesis has ended, not until the growth of all the ingredients that enter into the final composite has been

traced, however faintly, should the analysis begin. Not until the history of the law systems of the civilized world, with which we have to deal, has been drawn out by the aid of the Historical Method, should an effort be made to classify and define the elements that enter into them by the aid of the Analytical. Until we have ascertained how law grew, it is impossible to understand what it is. The final outcome, so far as this treatise is concerned, is embodied in the following conclusions: (1) as law is a living and growing organism which changes as the relations of society change, the Science of Jurisprudence must look behind the law into those social relations which are generally recognized as having legal consequences, in order to note, as Austin has expressed it, "those resemblances between different systems which are bottomed in the common nature of man"; (2) in the light of knowledge thus obtained this science must extract from the mass of details embodied in the several systems of positive law enforced by the political sovereignties composing the family of nations the comparatively few and simple basic ideas that underlie the endless variety of legal rules; (3) such a science is from its very nature an applied and progressive science whose generalizations must be made anew whenever the data change through the creation of new systems of positive law; (4) no matter whether we look to the ancient or to the modern world, it appears that Comparative Law has ever been the subsidiary science that collects the data to which the Science of Jurisprudence has been and must ever be applied. Not until after that collecting agency has gathered the materials can Jurisprudence, as an analytical and applied science, formulate an orderly scheme of the purposes, methods, and ideas common to every system of positive law. There is no good reason to doubt that through the application of the incipient Science of Jurisprudence to the data collected by Comparative Law, Roman jurists were able to extract from

the various codes of the cities with which Rome came into commercial contact a set of principles embodying the general conceptions of legal right then dominant in the ancient world and known as the law of the nations — *jus gentium*. After the lapse of twenty centuries, a new system of codes, far greater in number and far more voluminous in detail, have come into existence, from which the jurists of to-day should be able to extract, through a reapplication of the Roman method, the comparatively few basic principles that underlie them all. As more rapid intercommunication draws the nations of the world closer together, the longing increases for a modern law of the nations, that is, for a uniform conception of legal right, capable of embodiment in a code of substantive and adjective law, which must emerge, if at all, from existing codes, like the single and typical face in a composite photograph to which many features have contributed their influence.

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PART I

HISTORICAL

CHAPTER I

ANALYTICAL AND HISTORICAL METHODS CONTRASTED

1. The expounders of the Science of Politics, of which Jurisprudence is only a distinct and important branch, are divided into two schools whose methods ¹ of investigation and demonstration are radically different from each other. To a student of the older or Analytical School a constitution, a code of laws or customs, present themselves as things that have existed from the very beginning in their present form. His primary duty therefore involves only such an analysis of their various provisions as will reveal the existing rules under which rights and duties are defined and remedies administered. With the history of the processes through which such constitutions or codes came into existence he has nothing directly to do; in his view the history of law is really no part of Jurisprudence; it is simply a sidelight which may or may not be used as an aid to interpretation. Putting aside the teachings of history, except such as are permanent in nature, and rejecting the fact that political and legal institutions can best be studied, not as

Jurisprudence a branch of the Science of Politics.

Analytical Method.

¹ The claim is often made that there are four methods: the metaphysical or *a priori*, the analytical, the historical, and the comparative. Certainly the last is simply a branch of the historical. Mr. Bryce admits that it is simply an "extension of the historical method." (*Studies in Hist. and Jur.*, p. 620.) There are but two distinct schools, the analytical and the historical. It should be said, however, that the first is divided into two branches, the one beginning with the investigation of the abstract ideas of right and law in their relation to morality, freedom, and the human will generally; the other beginning with the actual facts of law as they now appear, when metaphysics and ethics are excluded from view. The difference, in a general way, is that which divides German expounders of *Naturrecht* from the Benthamites.

arbitrary or imaginary combinations, but rather as belonging to societies of definite historical types, the student of the analytical school proceeds, with the aid of an *a priori* process, to elaborate his own conception of the inherent nature of rights and law. Such in general terms was the nature of the method applied to the study of the Science of Politics upon its revival by Machiavelli, Bodin, and Hobbes, after the existing state system of Europe had taken on definite and permanent form. The fact should never be lost sight of that the separation of the sciences, to which we are so accustomed, and which we take for granted, was unknown to that remote antiquity in which the world with all its phenomena was studied as a whole. Not until that single problem, in which the facts of nature and the doings of man were alike conceived of as ordained by the gods, was gradually broken up into minor problems was the line drawn between those sciences which deal with external nature, including theology and metaphysics, and those which deal with the actions of men. If we follow the Greeks, we must regard ethics as dealing essentially with man in his relations to his fellow-men, — politics as dealing essentially with man not simply as a member of society, but as a member of some particular society organized in a particular way, and exercising supreme authority over its members. The fundamental maxim of Aristotle, the founder of the Science of Politics, is that man is born to be a citizen — "Ἀνθρωπος φύσει πολιτικὸν ζῶον. He cannot isolate himself without becoming either less or more than man (ἢ θηρίον ἢ θεός). The cityless man (ἄπολις) — the natural man of Hobbes and Rousseau — must be more or less than man, — either superhuman or a monster. The assumption is that the state is a prime necessity to man; the state is prior in idea to the individual; the normal conception of man is of a man in a state of civilization. On those grounds Aristotle went on from his *Ethics* to the composition of his

As applied
by Machia-
velli, Bodin,
and Hobbes.

Separation
of the sci-
ences.

Aristotle
the founder
of political
science.

His separa-
tion of
ethics from
politics.

Politics. He made the capital advance of separating ethics from politics.

After the Roman Empire completed the work which the Macedonian supremacy had begun by reducing men of all kindreds and nations to a common subjection, the scientific study of politics expired with political independence. Not until after a sleep of many centuries, broken only by a few indistinct mutterings in the Middle Ages, was there a serious revival of interest in the theory of politics which came as a part of the general movement known as the Renaissance. The twelfth century witnessed the enthusiastic revival of the study of Roman law; the thirteenth, the spread of the scholastic philosophy; the fourteenth, the appearance in Italy of a new literature adorned first by the name of Dante, then by that of Petrarch. Along with this literary revival there came a general uprising throughout Europe of the human mind against the entire system of authority, spiritual and temporal, by which men were governed, an uprising that manifested a tendency to apply thought to practical ends through the reorganization of society upon fixed and definite principles. Under the new influences the Middle Ages, essentially unpolitical, gave birth at the close to Politics, and with them appeared "the first of a class of persons whom friends and enemies may both, though with different meanings, call ideal politicians."¹ Hard as it may be to apply that term in any except a bad sense to Machiavelli, to that epoch he belongs, and with him the modern study of politics begins. Gentilis, one of the founders of international law, who followed upon the heels of Machiavelli, defended him on the ground that his *Prince* was only a veiled satire upon the vices of princes, intended as an exposition of their tyranny and as an admonition to the people. It cannot be proven that Machiavelli really sanctioned either fraud or treachery. For the first time

Revival of
the theory
of politics.

Its modern
study begins
with Ma-
chiavelli.

¹ Bryce, *Holy Roman Empire*, p. 232.

since Aristotle we find in him the serene spirit of a man of science attempting to establish the groundwork of his reasoning through the revival of the neglected separation of ethics from politics in a form so extreme as to reach "even to the point of apparent paradox and scandal. Machiavelli takes no account of morality. He assumes certain ends to be in the view of a prince or nation."¹ While it may be true that his works are more concerned with the details of statecraft than with the analysis of the state, the fact remains that he did study the nature of sovereignty. "I have made," he says, "a treatise, *De Principatibus*, where I go to the depth of my ability into the consideration of this matter, discussing what is the nature of sovereignty, what kinds of it there are, how they are acquired, how maintained, and for what causes lost." As the *Principe* is an offshoot from the main theme of the *Discorsi*, we must look to both for the speculative fruits of the author's experience and observation combined with his deductions from Roman history. Both works are directed to the same philosophic end, — the analysis of the conception of the state, studied under the two main types, republican and monarchical.

His
Principe.

Jean Bodin.

Machiavelli's *Principe* was completed before the end of 1513, and in 1530 was born Jean Bodin, who, after lecturing for some time on jurisprudence at Toulouse, began to practice at the bar at Paris. In 1576 appeared his *Les six livres de la République*,² which represents the first attempt made in modern times to construct an elaborate system of political science, embodying the modern theory of the state whose vital point, the doctrine of political sovereignty, was stated at the earliest

Common-
wealth, em-
bodying
modern
theory of
the state.

¹ Pollock, *History of the Science of Politics*, p. 42. See also F. Costèro, Preface to *Il Principe*, Milan, etc., 1875.

² Sir William Hamilton has said: "From the time when Aristotle wrote his eight books of *Politics*, until the time when Montesquieu wrote his thirty-one books on *The Spirit of Laws*, the six books of the *Republic* of Bodinus is the ablest and most remarkable treatise extant on the philosophy of government and legislation; and even until the present day these three authors stand out as the great political triumvirate." In 1586 Bodin issued a Latin version of his *magnum opus*, for the use chiefly of English students of law and politics.

possible moment perhaps after the completion of the existing European state system in which the idea of territorial sovereignty is the basis of all international relations. Bodin clearly announces that in every independent community governed by law there must be some authority, whether residing in one person or several, whereby the laws themselves are established, and from which they proceed. That authority, while not above duty and moral responsibility, must, as the source of law, be above the law; that is, above the positive laws as we would now say of the particular state. "Sovereignty is a power supreme over citizens and subjects, itself not bound by the laws." That kind of legal supremacy of the state was scarcely conceivable prior to the process of emancipation through which the medieval European states acquired local habitations, permanent establishments, and definite boundaries. While Bodin declares that the absolute power in the state which we call the sovereign owes no legal duties to subjects or citizens, he admits that it owes moral duties; that is, in the juridical language of his time, it is bound by the law of nature. By distinguishing legal obligation in the strict sense from purely moral duties on the one hand, and from the duties created by convention between independent powers on the other, Bodin paved the way for the clear separation of the legal from the ethical sphere of thought within political science itself.

Definition
of sov-
erignty.

Distin-
guishes be-
tween legal
obligation
and moral
duty.

Hobbes, whose analytical method Bodin definitely anticipated, was born in 1588, and his *Leviathan, or the Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil*, appeared in 1651. Not content to rest the doctrine of sovereignty as Bodin had in the preceding century on a pure analysis of the fact of civil government, Hobbes attempted to fortify it by cutting off all excuse for disputing the authority of the state by creating, *a priori*, an imaginary covenant between its members, familiar to later publicists as the Original or Social Contract. Under that needless and untenable fiction

Hobbes's
Leviathan,
1651.

Original
or Social
Contract

it was not enough that men should abandon so much of their natural rights as is inconsistent with living in peace, there must be "a common power to keep them in awe, and to direct their actions to the common benefit." Every member of the commonwealth gives up to the chosen head the right to govern himself on condition that every other member does the same, and thus a new and a corporate person is created, "and he that carrieth this person is called *sovereign*, and hath sovereign power; and every one besides, his *subject*." The limits of the sovereignty thus created are defined by those powers or rights of the individual man which he cannot surrender by any covenant. As between the state and the individual laws are to be obeyed not because they are reasonable, but because the state has so commanded. "The Lawes of Nature," says Hobbes, "are not properly lawes, but qualities that dispose men to peace, and to obedience. When a Commonwealth is once settled, then they are actually lawes, and not before; as being then the commands of the Commonwealth.¹ . . . Positive are those which have not been from eternity; but have been made lawes by the will of those that have had the Sovereign power over others. . . . Civil law is to every subject those rules which the Commonwealth hath commanded him by word, writing, or other sufficient sign of the will, to make use of for the distinction of right and wrong; that is to say, of what is contrary and what is not contrary to the rule." It is the merit of Hobbes to have put it beyond all question that right and wrong, in the legal sense, are that which the state allows and forbids, and nothing else. A law being a command addressed to the subject, it must be communicated in order to be effectual. "Law in general is not counsel but command; nor a command of any man to any man; but only of him whose command is addressed to one formerly obliged to obey him." While to

Definition
of sover-
eignty.

Of positive
laws.

¹ *Leviathan*, p. 138. "Das Recht existirt erst vermöge der Sanction der Rechtsgemeinschaft des einzelnen Staates." Von Bar, *Das internationale Privat- und Strafrecht*, p. 519.

Aristotle is due the credit of separating ethics from politics, it is through Hobbes that we derive the farther separation of that which is wise or expedient from that which is allowed by positive law, as it is usually expressed, of policy from legality. But after defining sovereignty and legality with great power and precision Hobbes made it necessary to carry the work of division farther by endeavoring to swallow up policy, and to a considerable extent morality, in positive law. Not until after a long interval was the process of separating the theory of political sovereignty from that of the ethical and historical foundations of political society completed in England by John Austin, who published his *Province of Jurisprudence Determined* in 1832, a treatise on the relation between ethics and law, in which the way was opened for a clear conception of a pure science of positive law. Assuming the sovereign authority of the state as the ultimate source of laws and legal institutions as they exist, he analyzed and classified them without regard to the moral, social, or historical reasons which may have moved the sovereign to approve them. "The matter of jurisprudence is positive law: law simply and strictly so called: or law set by political superiors to political inferiors." The essence of Austin's quaint and pedantic description of positive law is that it must be a command armed with a definite sanction and issuing from a determinate author. Every positive law is "set by a sovereign person or sovereign body of persons to a member or members of the independent political society wherein that person or body is sovereign or superior." The question is not as to the historical origin of the principle, but as to its present authority. "The legislator is he, not by whose authority the law was first made, but by whose authority it continues to be law." Austin's great task was therefore to distinguish between laws properly so called and laws improperly so called. The word "command" is the key to his analysis of law. A law properly so called is a

Separation
of policy
from le-
gality.

Austin's
*Province of
Jurispru-
dence Deter-
mined*, 1832.

Positive law
defined.

Law as a
command.

command, an order issued by a superior to an inferior, and "the party to whom it is directed is liable to evil from the other in case he comply not with the desire." The evil is called a sanction, and the command or duty is said to be sanctioned by the chance of incurring the evil. Thus are inseparably connected the terms "command," "duty," and "sanction." To employ his own language, "each of the three terms signifies the same notion, but each denotes a different part of that notion, and connotes the residue." All commands, however, are not laws, that term being limited to those commands which oblige generally to the performance of acts of a class. Having thus arrived at a definition of laws properly so called, it was necessary in the next place, in order to prevent confusion, to differentiate them from the mass of things to which common speech gives the name of law. Such, for instance, to use Blackstone's¹ classification, as (1) the laws of inanimate matter; (2) the laws of animal nutrition; (3) the laws of nature which are rules imposed by God on men and discoverable by reason alone; and (4) the revealed or divine law, which is part of the law of nature directly expounded by God. While all such laws may be said to embody "a rule of action dictated by some superior being," they are not commands in the only proper sense of that term, they are not commands addressed by a human superior to a human inferior. Austin therefore rejects them as metaphorical or figurative laws, laws improperly so called. Thus the conclusion was reached that of true laws those only are the subjects of jurisprudence which are laws strictly so called, or positive laws. Not, however, until Austin's conclusions — weakened and disfigured as they are by a lack of accurate knowledge of what the law then was, by an absolute ignoring of history, by entanglement with irrelevant and to some extent bad moral philosophy, and by a pedantic and repellent style — had passed through a mental crucible of the highest order, could it be said

Laws
improperly
so called.

Holland's
*Elements of
Jurispru-
dence*, 1880.

¹ Comm. 1, 21.

that the work which Hobbes so greatly advanced was finally systematized and completed on a strictly scientific basis. In 1880 Thomas Erskine Holland published his *Elements of Jurisprudence*, characterized by an eminent critic as "the first work of pure scientific jurisprudence which has appeared in England; that is, of the general science of law distinctly separated from the ethical part of politics."¹ In Holland's great work, now in the tenth edition, the principles of the Analytical School, after critical reëxamination, have been restated under the three heads into which the subject logically divides itself: (1) the nature of sovereign political authority; (2) the nature of positive laws enforced by a sovereign political authority; (3) the rules of human actions, called laws merely by analogy, not so enforced. Every state is divisible into two parts, one of which is sovereign, the other subject. The sovereignty of the ruling part has two aspects. It is "external," as independent of all control from without; "internal," as paramount over all action within. Without external sovereignty no state is qualified for membership in the family of nations. The questions which arise with reference to internal sovereignty relate to the proportion borne by the sovereign part of the state to the subject part. "The primary function of constitutional law is to ascertain the political center of gravity of any given state. . . . The sovereign part of the state, as thus ascertained, is omnipotent. Since it is the source of all law, its acts can never be illegal." Having thus described the nature of sovereignty, he defines a law properly so called to be "a general rule of external human action enforced by a sovereign political authority. All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only." The rules for the guidance of human action which are within the domain

Pollock's
tribute.

Sovereignty
defined.

Positive law
defined.

¹ Pollock, *History of the Science of Politics*, p. 63.

"Ethic and
Nomology."

of the moral sciences and outside of the province of jurisprudence, because not enforceable by a sovereign political authority, he groups under the heads "Ethic and Nomology." Ethic is the science of those rules which when known are themselves adopted by the will as its objects or aims. This rightness of will can never be enforced by external legislation. All that external legislation can do is to affect the external expression of the will in act. The science of this office of external regulation is called "nomology," and is defined, in the words of Kant, to be "science of the totality of the laws for which an external legislation is possible."¹ This science of external action is divided, according to the authority by which the rules of which it treats are enforced, into (1) a science of rules enforced by an indeterminate authority; (2) a science of rules enforced by determinate authority. Under the first head are grouped the so-called laws of fashion, of honor, of morality, and of nature; under the second, rules imposed, or supposed to be imposed, upon mankind by God or Gods, and generally known as divine laws.

Historical
Method and
its hand-
maids.

2. The Historical Method of investigating the origin and growth of law, public and private, beginning with its germs in primitive society, attempts to explain its nature and meaning through the record of its development. The main difficulty in the way of complete demonstration is the fragmentary character of the evidence as to the initial forms of law in the early periods. Only by a comparison of such fragments as have been preserved in the survivals of ancient law or custom, in the usages of savage tribes and stagnant nations, or in the annals of a few ancient historians is it possible to reconstruct primitive society as a complete organism. The same process of thought that gave birth to Comparative Anatomy and

¹ "This definition is applied by Kant, *Rechtslehre*, p. 27, to the science of law. He opposes '*Rechtslehre*' to '*Tugendlehre*,' making these two species exhaust the genus '*Sittenlehre*.'" Holland, *Elements of Jurisprudence*, p. 26, note 3.

Comparative Philology, at a little later day, brought forth Comparative Politics and Comparative Law. To a student of Comparative Politics "a political constitution is a specimen to be studied, classified, and labeled, as a building or an animal is studied, classified, and labeled by those to whom buildings or animals are objects of study. We have to note the likenesses, striking and unexpected as those likenesses often are, between the political constitutions of remote times and places; and we have, as far as we can, to classify our specimens according to the probable causes of those likenesses."¹ The name of Montesquieu is connected much more definitely with the beginning of the Historical Method than that of Machiavelli with the Analytical. In the *Esprit des Loix*, often spoken of as "one of the most important books ever written," its author made a new departure by attempting to state, even in a very imperfect way, a comparative theory of politics and law based on wide observations of the actual systems of different lands and ages. While his historical method may have been crude and his style too discursive; while he no doubt failed to discover that institutions are an affair of race as well as circumstance, he did see that customs which appear to us foolish or monstrous do not exist without any reason at all, and that the institutions of a society depend on its particular conditions, and must be studied in connection with them.² In that way he aided profoundly in bringing about the transition which has taken place since his time from the old or artistic method of historical investigation to the new or sociological. The cause of the transition was the consciousness that the system of permanent, uniform and universal law that regulates growth and decay in the physical world applies as well to the growth

Origin of
Comparative
Politics
and Com-
parative
Law.

Mon-
tesquieu's
connection
with the
Historical
Method.

Cause of
transition
from old
to new
method.

¹ Freeman, *Comparative Politics*, p. 23. In that brilliant and original work the name of the new science finds its origin.

² See Sir Frederick Pollock's lecture delivered at Oxford in 1903, and entitled "The History of Comparative Jurisprudence," *Journal of the Society of Comparative Legislation*, pp. 83-84.

and decay of societies as to other phenomena. The French Revolution gave a strong impulse to the new idea, and the French scholars, who were nearest to the upheaval that brought suddenly into view the underlying social forces that had lain ominously silent during the dreadful calm of the latter days of the *ancien régime*, were the first to undertake, after the peace of 1815, the mighty task of rewriting the history of the world from a new point of view. Michaud, the Thierrys, Sismondi, Michelet, and Guizot led the way, and upon their heels came Auguste Comte, who raised himself to the level of Leibnitz and Descartes, by perceiving that social organization must be viewed and explored as a whole because of the connection between each leading group of social phenomena and every other leading group so intimate as to make a change in one result in a corresponding modification in all the rest.

Auguste
Comte.

Compara-
tive Politics
and its best
fruits.

The
village
community.

Unit of
the state.

The most valuable single result so far attained through the application of the Comparative Method to the study of political institutions is embodied in the discovery that the unit of organization in all the Aryan nations, from Ireland to Hindostan, was the naturally organized association of kindred — the family swelled into the clan — which in a settled state assumed the form of a village community. “The *γένος* of Athens, the *gens* of Rome, the *mark* or *gemeinde* of the Teutonic nations, the village community of the East, and, as I have said, the Irish clan, are all essentially the same thing.”¹ No historical jurist claims an anterior condition to that in which the patriarchal family — “a group of men and women, children and slaves, of animate and inanimate property, all connected together by common subjection to the paternal power of the chief of the household” — is the unit of society. It seems to be beyond question that a great part of the “legal ideas of civilized races may be traced to this conception, and that the history of their development is the history of its slow unwinding.”² In

¹ *Comparative Politics*, p. 102.

² Maine, *Village Communities*, p. 15.

firmly taking hold of the fact that the village community is simply the family swelled into the clan in a settled condition, we possess ourselves of the atom or unit which, in different forms and different combinations, everywhere enters into the structure of the state. When we turn to the Hellenic world, in which the science of politics was born, we there find the dominant form of political organization embodied in the independent city-state which stands toward all other cities as a sovereign commonwealth whose internal affairs are regulated by its own domestic constitution. An examination of the internal organization of such a community reveals the fact that the city-state is a composite whole, which has arisen out of the aggregation of village communities. The first stage in the aggregation is represented by the gathering of a group of village communities or clans (*γένηα*) into a brotherhood (*φρατρία*); the second by the gathering of brotherhoods into a tribe; the last by the gathering of tribes into a city.¹ The aggregate thus made up, the independent city, embodied the only practical conception of the state which existed in the Hellenic world. To the Greek mind the state, the city-commonwealth, was an organized society of men dwelling in a walled city with a surrounding territory not too large to allow its free inhabitants habitually to assemble within its walls to discharge the duties of citizens.² Aristotle's political reflections were confined in the main to the constitutions of Greek states, and the typical Greek state was the independent city. While it is true that sometimes a Greek city would be reduced to a relation of bondage to another city, and while it would sometimes confederate upon equal or unequal terms with other cities, there was never any such thing as admitting either subjects or allies to a common franchise, there was never anything like a merger

Hellenic
city-states.

Basis of
Aristotle's
political
reflections.

¹ See Coulanges, *The Ancient City* (Small's trans.), p. 168.

² Aristotle thought that a state should not be too large to deny to its citizens the opportunity to become familiar with each other. *Ἀναγκαῖον γνωρίζειν ἀλλήλους, ποῖοί τινές εἰσι, τοὺς πολίτας.* *Pol.*, vii. 4. 13.

Italian
city-states.

of the independent city into a larger aggregation, which in any proper political sense could be called a nation. When we pass from the Greek to the Italian peninsula, we there find the idea of the independent city-state to be the dominant political idea, and we also find the Italian city to be the resultant of the process of aggregation in which the village community is the unit or starting point. In Italy the village community appears as the *gens*. Out of the union of *gentes* arose the tribe; out of the union of tribes arose the city-commonwealth. But the idea of the state as an independent city was never carried out with the same completeness in Italy as in Greece, for the reason that Italian cities, which were generally smaller than those of Greece, manifested a greater willingness to join together in confederations. In that way the history of ancient Italy is far more a history of confederations than of single cities. And yet it was upon the soil of Italy that a group of village communities grew into a single independent city that centralized within its walls the political power of the world. The way in which Rome accomplished that marvelous result was by departing from the exclusive policy of the Greek cities and by extending the right of Roman citizenship alike to her conquered enemies and to her faithful allies. The franchise of the Roman city was first extended to Italy, then to Gaul and Spain, and finally to the whole Roman world.¹ In the end a right so widely bestowed became of course utterly worthless; but the theory upon which it was conferred was never for a moment lost sight of. The freeman who received the franchise of the Roman city could only enjoy it within her own walls; it was only within the local limits of the ruling city that the supreme powers of the state could be exercised.

Origin and
growth of
Rome as a
city-state.

¹ As to the edict of Caracalla, extending the privilege of Roman citizenship to all the free inhabitants of the Empire, see Maine, *Ancient Law*, p. 139; Gibbon, *Decline and Fall*, i. 185, 193; Guizot, *History of Representative Government*, pp. 181, 182; Bryce, *Studies in History and Jurisprudence*, pp. 40, 85, 585, 758; Dr. L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*, ch. vi.

And so whether we take for illustration the exclusive Greek city, or the great Latin city extending its franchise to all the world, the ancient conception of the state as the city-commonwealth stands forth clearly and distinctly defined. In that way jurists of the historical school have made a complete understanding of the constitutional and international law of the ancient world possible.

Dominant
conception
in ancient
world.

Out of the settlements made by the Teutonic nations upon the wreck of the Roman Empire has gradually arisen the modern conception of the state as a nation occupying a definite area of territory with fixed geographical boundaries, the state as known to modern international law. In the *Germania* of Tacitus we have the contemporaneous observations of one of the greatest and most accurate of historians upon the social and political organization of the Teutonic race while yet in its childhood. According to his account the race now called Teutonic, although of the same physical type, and speaking the same language, and although possessed of a common mythology, and a common system of social, political, and military institutions, did not possess in its own tongue a common name by which to describe the race as a whole, nor any form of central political organization.¹ This homogeneous race was broken up into an endless number of political communities or tribes which stood to each other in a state of complete political isolation, except when united in temporary confederacies. The typical Teutonic tribe—the *civitas* of Caesar and Tacitus—represented an aggregation of hundreds, while the hundred represented an aggregation of village communities. The spot inhabited by the village community is called in German *muniments*, the mark,—an area of land marked out and defined by settled boundaries. The internal affairs of the mark were regulated by a village council or mark-moot, in which every markman had his place. The parallel be-

Modern
conception
of state as
a nation.

Teutonic
political
organi-
zation.

¹ Tac., *Germania*, cc. 1-4.

Parallel
between
Teutonic,
Greek, and
Latin tribe.

In Greece
and Italy
tribes
united in
city-states;

in Teutonic
lands in
nations.

tween the Teutonic, the Greek, and the Latin tribe seems to be complete. The *γένος*, the *gens*, the *mark*, represent the same thing, — the village community; while the *φρατρία*, the *curia*, the hundred, seem to represent the same thing, — a group or union of village communities.¹ Out of the aggregation of such intermediate groups, or hundreds, arose the tribe itself. But here the parallel ceases. In the Mediterranean peninsulas the resultant of the union of tribes was the city-commonwealth; in Teutonic lands the resultant of a union of tribes was not a city at all, but a nation. In ancient Greece and Italy the city became the heart, the center of social and political life; while in countries inhabited by the Teutonic race the idea of the city never became dominant. The Teutonic city, if it was to be found at all, was simply the dwelling place of part of the nation who were in no wise privileged above those who dwelt beyond its bounds. At the time Tacitus wrote the typical Teutonic tribe (*civitas*) was a distinct commonwealth, the largest and highest political aggregate. Not until nearly a hundred years later were these scattered tribes gathered into larger wholes — into nations.² When that stage was reached, when tribes were fused into the higher political unit, — the nation, — the primitive Teutonic conception of the state widened into its full and final development. But another stage of growth had yet to be passed before the new unit, which thus arose out of an aggregation of tribes, reached the full modern conception of the state as a nation possessing a definite portion of the earth's surface with fixed geographical boundaries. The fact must be borne in mind that the primary bond which united the people who composed a Teutonic nation was a personal one, — the national king was the first among the people, the embodiment of the national being, but not the king of a particular area or region

¹ *Comparative Politics*, pp. 66–67. 2d ed.

² Zeuss, *Die Deutschen und die Nachbarstämme*, pp. 303, 304.

of territory. The idea of sovereignty was not associated in the Teutonic mind with dominion over a particular portion or subdivision of the earth's surface. The Merovingian line of chieftains were not kings of France, they were kings of the Franks; Alaric was king of the Goths wherever the Goths happened to be, whether upon the banks of the Tiber, the Tagus, or the Danube.¹ The leading idea which seems to have prevailed among the conquering nations that settled down upon the wreck of Rome was that they were simply encamped upon the land whose possession they had won. The conception of sovereignty which the Teutons brought with them from the forest and the steppe was distinctly tribal or national and not territorial. The general nature of the transition whereby the primitive notion of tribal sovereignty was gradually superseded by that of territorial sovereignty has been described as a movement from personal to territorial organization;² from a state of things in which personal freedom and political rights were the dominant ideas to a state of things in which those ideas have become bound up with and subservient to the possession of land.³ The most striking single result of the transition — which, for the want of a better term, has been called “the process of feudalization” — is that the elective chief of the nation, the primitive embodiment of the tribal sovereignty, is gradually transformed into the hereditary lord of a given area of land. The new conception of sovereignty, which thus grew out of “the process of feudalization,” did not become established, however, until after the breaking up of the empire of Charles the Great, out of whose fragments have arisen most of the states of modern Europe. The completion of the transition is marked by the accession of the Capetian dynasty in France. When the hundred years' struggle between the Dukes of Paris and the descendants of Charles

Tribal
sovereignty.

Transition
to territorial
through feu-
dalization.

Completion
marked by
accession of
Capetian
dynasty in
France.

¹ Maine, *Ancient Law*, p. 100; Freeman, *Norman Conquest*, i. 53.

² Palgrave, *English Commonwealth*, pt. i., p. 62.

³ Stubbs, *Constitutional History*, i. 166.

the Great ended in the triumph of Hugh Capet, he not only assumed the dynastic title of King of the French, but he also styled himself King of France.¹ Hugh Capet and his descendants were kings in the new territorial sense; they were kings who stood in the same relation to the land over which they ruled as the baron to his estate, the tenant to his freehold. The form thus assumed by the monarchy in France was reproduced in each subsequent dominion established or consolidated; and thus has arisen the state system of modern Europe, in which the idea of territorial sovereignty is the basis of all international relations.

Basis of
state sys-
tem of
modern
Europe.

Sovereignty
as defined
by Bodin,
Hobbes, and
Austin.

Such was the historical evolution and such the nature of the typical European state to whose analysis Bodin devoted himself in the sixteenth century, when, at the earliest possible moment perhaps, he defined its cardinal attribute, — political sovereignty over a definite area of territory, a sovereignty “supreme over citizens and subjects, itself not bound by the laws.” An account has been given already of the process through which the modern theory of the state thus propounded by Bodin was amplified and refined first by Hobbes and then by Austin, who declared that positive law must be a command, armed with a definite sanction, and issuing from a determinate authority.² A notable criticism of Austin’s definition of sovereignty has been made by Sir Henry Maine, who claims that there are countries where the sovereign authority cannot by any stretch of language be said to command the laws, and yet where laws manifestly exist. “My instance,” says Sir Henry, “is the Indian province called the Punjaub, the Coun-

Austin’s
definition
criticised by
Maine.

¹ *Ancient Law*, p. 104. Freeman was once inclined to challenge Maine’s statement, but he afterwards wrote me: “I should not say that what Maine says about *Rex Francorum* and *Rex Franciae* was other than right in a general way. Those things came in gradually. *Roi de France* comes in pretty early — as early as Wace. I doubt whether *Rex Franciae* is ever used, till Henry IV.’s *Rex Franciae et Navarre*, as a formal Latin title.” See also *Norman Conquest*, vol. i., Appendix, note M, p. 395.

² See above, pp. 9, 10.

try of the Five Rivers, in the state in which it was for about a quarter of a century before its annexation to the British Indian Empire. After passing through every conceivable phase of anarchy and dormant anarchy, it fell under the tolerably consolidated dominion of a half-military, half-religious oligarchy known as the Sikhs. The Sikhs themselves were afterward reduced to subjection by a single chief belonging to their order, Runjeet Singh. At first sight there could be no more perfect embodiment than Runjeet Singh of sovereignty as conceived by Austin. He was absolutely despotic. Except occasionally on his wild frontier he kept the most perfect order. He could have commanded anything. The smallest disobedience to his commands would have been followed by death or mutilation; and this was perfectly well known to the enormous majority of his subjects. Yet I doubt whether once in all his life he issued a command which Austin would call a law. He took as his revenue a prodigious share of the produce of the soil. He harried villages which recalcitrated at his exactions, and he executed great numbers of men. He levied great armies; he had all material power, and he exercised it in various ways. But he never made a law. The rules which regulated the lives of his subjects were derived from their immemorial usages, and those rules were administered by domestic tribunals in families or village communities; that is, in groups no larger or little larger than those to which the application of Austin's principles cannot be effected on his own admission without absurdity."¹ The recognized English leader of the Historical School in this sharp assault upon a basic principle as defined by one of the foremost exponents of the Analytical loses sight of the fact that the mere size of the separate communities would make no sort of difference to the theory of Austin, who would no doubt have regarded the empire of Runjeet Singh as divided into small districts, the

Weak point
in Maine's
view.

¹ *Early History of Institutions*, p. 380.

headman or council in each taking his orders from Runjeet Singh, and enforcing them, each in his own sphere, relying in the last resort on the force at the disposal of the suzerain. As Austin's definition has nothing to do with the historical origin of laws, it is a matter of no importance that what he calls a "command" is not a law or rule which the sovereign has announced in the first instance. As many laws are based upon immemorial practices, or have their source in the writings of jurisconsults, they are not traceable to the sovereign at all in the sense of commands issued by him. Austin's definition looks not to the authorship of the law as a principle, but to the person or persons who in the last resort cause it to be obeyed. When in any given case rules are habitually enforced by physical penalties, administered by a determinate person or portion of the community, they should be regarded as positive laws, and as such within the province of jurisprudence. Holland has clearly summed up the whole matter in the statement that "disobedience to the village custom or the provincial law may either be forcibly repressed, or it may be acquiesced in, by the local authority. If it be habitually repressed by such local force as may be necessary, it follows that the local force must, if only for the preservation of the peace, be supported, in the last resort, by the whole strength of the empire. In this case the humblest village custom is a law which complies with the requirement of being enforced by the sovereign."¹ With Maine's objection to the inadequacy of Austin's definition of sovereignty explained away, it cannot be said that there remains any real difference of view between the Analytical and Historical schools either as to the nature of political sovereignty or as to its enforcement through positive law. When the best fruits of the two methods are thus placed in juxtaposition, who can fail to perceive how they illustrate and sustain each other?

Holland's
summing up.

¹ Holland, *Elements of Jurisprudence*, p. 51.

While that branch of Sociology which treats of prehistoric political institutions has engaged a much larger share of attention than the history of laws, the fact remains that the efforts in that direction of two epoch-making men, the one German, the other English, have resulted in the creation of what may be called the natural history of law. The greatest master of legal history in the last century was Friedrich Carl von Savigny (1779-1861), the founder or consolidator of the Historical School of Jurisprudence, who applied that method only in a very limited way to the general theory of politics. When, in 1803, he published his *Das Recht des Besitzes*, or the right of possession, jurists perceived that the old uncritical study of Roman law was at an end. Austin pronounced it to be "of all books upon law, the most consummate and masterly." Thus from a new fountain came a stream of legal literature which has not yet ceased to flow. Ihering says, "With the *Recht des Besitzes* was the juridical method of the Romans regained, and modern jurisprudence born." In 1814 appeared Savigny's pamphlet *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, in which he expressed the then new idea that law is a part and parcel of national life. "I regard," he said, "the law of each country as a member of its body, not as a garment merely which has been made to please the fancy, and can be taken off at pleasure and exchanged for another." Instead of regarding law as a creation of the will of individuals, Savigny maintained it to be the natural outcome of the consciousness of the people, like their social history or their language.¹ "As in the life of individual men no moment of complete stillness is experienced, but a constant organic development, such also is the case in the life of nations, and in

Compara-
tive Law
and its best
fruits.

Savigny
(1779-
1861).

Law as the
outcome of
national
conscious-
ness.

¹ "In no conceivable condition of mankind could it [law] ever have stood alone. It is peculiarly the product of every social force existing at any moment in the community; it reacts back upon the social forces as being in itself the most potent force of all." Amos, *A Systematic View of the Science of Jurisprudence*, p. 18.

every individual element in which this collective life consists; so we find in language a constant formation and development, and in the same way in law.”¹ He was thus among the first to perceive what everybody now understands, — institutions are not made, they grow. In 1815 appeared the first volume of his *Geschichte des römischen Rechts im Mittelalter*, the last volume of which did not appear until 1831.² That famous work embodies an emphatic protest against the habit of viewing the law of a nation as an arbitrary creation, not connected with its history and condition. And here the fact should be emphasized that the work of Savigny, as well as that of his immediate followers, dealt only with Roman materials. Comparative investigation of archaic legal systems had scarcely been undertaken at all, certainly not on any considerable scale. The almost unbroken soil of that rich and inviting field was destined to be turned over by the plow of one who revealed wonders. Sir Henry Sumner Maine (1822–1888), whose *Ancient Law* appeared in 1861, said in his preface that “the chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in Ancient Law, and to point out the relation of those ideas to modern thought.” No more modest announcement was ever made of something which proved to be almost a revelation, only supplemented and confirmed by subsequent research. To use the words of his successor at Oxford: “He showed, on the one hand, that legal ideas and institutions have a real course of development as much as the genera and species of living creatures, and in every stage of that development have their normal characters; on the other hand, he made it clear that these processes deserve and require distinct study, and cannot be treated as mere incidents in the general history

Savigny
dealt only
with Roman
materials.

Maine
(1822–
1888).

Scope of
his original
work.

¹ See *Introduction to the History of Jurisprudence*, by D. Caulfield Heron, London, 1880.

² *System des heutigen römischen Rechts* (8 vols., 1840–49); *Das Obligationenrecht* (2 vols., 1851–53).

of the societies where they occur. . . . Nowadays it may be said that 'all have got the seed,' but this is no justification for forgetting who first cleared and sowed the ground."¹ As Maine himself tells us in his first preface, the portions dealing with Roman law were never intended to take the place of an academic treatise on that subject. He only looked to that prolific source for illustrations of his general theory vitalized throughout by the true spirit of philosophy, and founded on facts derived from the most patient and thorough historical investigation. While the views of Rudolf von Ihering (1818–1892), a man of genius, coincide in several particulars, in a remarkable way, with those of Maine as to the evolution of modern from archaic law, there can be no question of borrowing either way, as Maine's theories were developed before Ihering's great work, *Der Geist des römischen Rechtes*,² appeared, and as Ihering, who could not read English with any facility,³ was never in a position to make use of Maine's work. In the construction of his remarkable chapter on "Ancient Codes" Maine was deprived of the light to be drawn from the now famous Code of Hammurabi, unearthed since his death, by M. de Morgan on the acropolis of Susa, the ancient capital of Elam in Persia, which reveals so clearly the state of society four thousand years ago. Hammurabi, commonly identified with the Amraphel of Genesis xiv. 1, was the first ruler over the whole of Babylonia who united all of lower Chaldea under one rule and founded a great empire that lasted about two thousand years. The laws of Hammurabi, recognized as a codification of decisions given in the civil courts and adapted to general use in Babylonia, were doubtless observed throughout the empire, even as far as Palestine, for centuries before Moses

Ihering
(1818–
1892).

Code of
Hammu-
rabi.

¹ Sir Frederick Pollock, *Introduction and Notes to Maine's "Ancient Law,"* pp. viii, ix. London, 1906.

² There is a French translation, *Esprit du Droit Roman*, by O. Meulenaere, revised by the author, in 4 vols. Paris, 1877–1878.

³ Sir Frederick tells us that he learned that fact from Ihering himself. *Op. cit.*, x.

entered the Holy Land, and continued in force until the Greek conquest under Alexander.¹ It is hard to speak of the recent discovery of an ancient code without reference to the bundle of papyrus leaves found by Dr. Bernardakis in the convent on Mount Sinai, containing parts of a commentary on *Ulpianus ad Sabinum*, written after the Theodosian Code but before that of Justinian, and therefore between 439 and 529.² A transcript of the originals was forwarded by the finder to Rodolphe Dareste, by whom they were published at Paris in 1880.

M. Dareste, a counselor of the Court of Cassation, widened his reputation by the publication of his *Études d'Histoire du Droit* in 1889; in 1893 he made an invaluable contribution to an important and neglected subject through *La Science du Droit en Grèce*; and in 1902 appeared his *Nouvelles Études d'Histoire du Droit*. Here tribute should be paid to the world-famous work of Fustel de Coulanges, *La Cité Antique, étude sur le culte, le droit, les institutions de la Grèce et de Rome*, so justly crowned by the French Academy. It is scarcely necessary to add that the varied and extensive contributions made during recent years to Comparative Politics and Comparative Law by Edward A. Freeman, Sir Frederick Pollock, and the Rt. Hon. James Bryce have never been surpassed either as to exhaustive research, acute criticism, or weightiness of philosophical reflection. Mr. Freeman invented the phrase "Comparative Politics" in his brilliant work which bears that title; Sir Frederick Pollock has condensed into his *History of the Science of Politics* as much as could possibly have been said within such narrow limits; while Mr. Bryce, in his *Studies in History and Jurisprudence*, has opened up a quarry in which

¹ Cf. V. Scheil, *Délégation en Perse. Mémoires publiés sous la direction de Morgan, délégué général*, tome iv., *Textes Elamites-Sémitiques*, Paris, 1902; Hugo Winckler, *Die Gesetze Hammurabi, König von Babylon*, Leipzig, 1903, 3d ed.; *The Oldest Code of Laws in the World*, trans. by C. H. W. Johns, Edinburgh, 1903; *The Code of Hammurabi, King of Babylon, about 2250 B.C.*, edited by Robert Francis Harper, Chicago, 1904.

² Between 440-450 A.D., says Baron. See *Centralblatt*, vii. 58.

students of government and law may work for all time. The strongest part, perhaps, of that remarkable production is the far-reaching comparison, worked out in great detail, between Roman and English law, considered as systems which have been extended over vast areas of foreign territory preoccupied by widely divergent codes of native law. Honorable mention of an humbler kind is due to the translation made in 1897, by Mr. J. H. Gubbins, Second Secretary of the British Legation in Japan, of the Civil Code of Japan, passed by the Diet in March, 1896.

CHAPTER II

JURISPRUDENCE AND ITS PROVINCE DEFINED

Jurisprudence is the science of positive law.

1. The way has now been cleared for the following questions: (1) what is the subject-matter of the Science of Jurisprudence; (2) for what purpose does it exist; (3) what is the nature of the processes through which it works out its results? In the preceding chapter a deliberate effort was made carefully to define the nature of positive law, for the reason that it is the sole and only subject-matter to which the science in question relates. The Science of Jurisprudence is the science of positive law, and its function is to extract from the mass of details, embodied in the several systems of positive law enforced by the political sovereignties composing the family of nations, the comparatively few and simple basic legal conceptions that underlie the infinite variety of legal rules. As Austin has well expressed it: "The proper subject of general or universal Jurisprudence is a description of such subjects and ends of laws as are common to all systems, and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in these several portions."¹ Wide apart as were Austin and Savigny, the statement of the former is only comprehensible in the light of the revelations as to the

Austin's statement.

¹ *Lectures on Jurisprudence*, iii. 356. "Government, marriage, ownership, contract, intestate and testamentary succession, crime, death, birth, fraud, malice, and accident are facts of human society which eternally accompany it from its birth to its dissolution. Law itself is only one of these facts; the necessary effect of which upon all the rest, and of the rest upon it, it has been seen to be the peculiar province of the jurist to watch and to describe." Amos, *A Systematic View of the Science of Jurisprudence*, p. 501.

real nature of law made by the latter, who developed the Historical Method into a universal philosophy of law, covering the ground which should be separately assigned to the Science of Jurisprudence, and the theories of legislation. In Savigny's system there is not the faintest approach to the Austinian analysis. The scope of it is not the analysis of law as a command, but that of a *Rechtsverhältniss*, or legal relation. Savigny gave expression to a path-breaking idea (*bahnbrechende Idee*), unfamiliar before his time, when in his *Beruf unserer Zeit*, which appeared in 1814, he said that law is a part and parcel of the life of a nation, "not a garment merely which has been made to please the fancy and can be taken off at pleasure and exchanged for another." Instead of considering law as the creation of the will of individuals, he regarded it as the natural outcome of the consciousness of the people, like their social habits or their language. To use his own words: *Das Gesetz ist das Organ des Volksrechts* (the people is always the true legislator). Thus the Historical School of Jurisprudence, speaking through Savigny, has given to the world the true conception of law which is rapidly becoming dominant, if not so already. Jurists are beginning to understand that "the matter of legal science is not an ideal result of ethical or political analysis; it is the actual result of the facts of human nature and history."¹ Or as Bryce has recently expressed it: Bryce's definition of law. "Although law may not have been created by the state, it tends as it grows to become more and more closely associated with the state as a function of the latter's energy. Though its leading doctrines and its fundamental institutions are in some respects essentially the same in all civilized communities, still every given system is, in the historian's view, forever changing, growing, and decaying, both in its theory and in its substance, . . . It (the Historical Method) conceives of national character and the circumstances of national growth

¹ Pollock and Maitland, *History of English Law*, Introd., p. xxiii. 2d ed.

Teaching
of the
Boston law
school.

Law is a
living and
growing
organism
which
changes as
the relations
of society
change.

Processes
of Juris-
prudence.

as creative forces, whereof law is the efflux and expression, being itself a living organism, which in its turn helps to shape the mind of the people. Accordingly it shows that each nation, rather than individual men, however potent, is, through what the Germans call its legal consciousness (*Rechtsbewusstsein*), the maker and molder of its laws."¹ In harmony with such ideas the School of Law of Boston University now bases its teachings largely on the contention that law is neither the command of an outside sovereign, nor a collection of abstract principles in force by the nature of things for all ages, but the expression for the time being of the dominant force of the community; that legal right broadly is what the dominant force in society, deflected more or less by opposition, requires or authorizes; in other words, what it wills.² Thus the Historical School has established the momentous conclusion that law, in its final analysis, is neither the command of an outside sovereign, nor a collection of abstract principles in force by the nature of things for all ages. Law is a living and growing organism which changes as the relations of society change.³ It thus becomes the province of the Science of Jurisprudence, or as it may be called for convenience Jurisprudence, to look behind the law into those relations of mankind which are generally recognized as having legal consequences, in order to ascertain whether or no there is unity or even resemblance in the basic conceptions that underlie them.

2. Having now defined the subject-matter of Jurisprudence and the purpose for which the science exists, the more difficult task remains to indicate the nature of the processes through

¹ *Studies in History and Jurisprudence*, pp. 617-618.

² See Introduction by M. M. Bigelow to "Centralization and the Law," *Scientific Legal Education*. Boston, 1906.

³ "The law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." Mr. Justice Holmes, *The Common Law*, p. 36.

which it works out its results. If, as an imperfect illustration, a state may be compared to a watch, its case or outer shell represents the state's political constitution, while its inner mechanism represents the interior code which defines the rights of persons, public and private, and indicates the procedure by which they are enforced. The primary purpose of that branch of the Historical Method known as Comparative Politics is to classify and label the outer shells of states as represented by their political constitutions; the primary purpose of that branch of the same method known as Comparative Law is to classify and label the interior codes under which rights recognized by law are enforced by state authority. Lord Bacon states the distinction in a general way when he says, "I consider that it is a true and received division of the law into *jus publicum* and *jus privatum*, the one being the sinews of property, and the other of government."¹ No matter whether we look to the ancient or modern world it appears that Comparative Law has ever been the subsidiary science which collects the data to which the Science of Jurisprudence has been and must be applied. Through the marvelous discoveries made during the last century by the masters of the science of language a great flood of light has been shed upon the earliest forms of social organization that existed in those nations with whose history we are at all concerned. Through the labors of the comparative philologists, not only has the original unity of the Aryan race been clearly established, but its prehistoric language has also been so far reconstructed as distinctly to indicate the stage of civilization attained by it before the departure from the common Aryan home. In the words of Peschel, "When the ancient vocabulary of the primordial Aryan age is restored by collecting the roots common to all the members, we at the same time obtain an outline of the social condition of these nations in the most

Compara-
tive Politics.

Compara-
tive Law
subsidiary
science that
collects the
data.

¹ Preparation toward the "Union of Laws," *Works*, vii. 731.

Application
of Comparative
Method
to language.

Jurispru-
dence an
analytical
and applied
science.

ancient period.”¹ This great revelation, which in the history of the intellect has been called “the discovery of a new world,”² has been brought about by the application of the Comparative Method to the study of language whereby the roots common to a large group of kindred tongues have been traced back to a common source. But the Comparative Method has not been confined to the study of language only; it has found a new and a broad field for its operation in its application to the comparative study of political institutions and of codes of laws. Thus alongside of the Science of Comparative Philology two new sciences have lately sprung into existence which have been styled Comparative Politics and Comparative Law. It has been well said that as abstract grammar is the outcome of generalizations upon facts representing similarities and differences in the growth of different languages, as collected and arranged by Comparative Philology, so Jurisprudence is the outcome of generalizations upon facts representing similarities and differences in the legal institutions of various countries as collected and tabulated by Comparative Law.³ Not until after that collecting agency has gathered the materials can Jurisprudence, as an analytical and applied science, formulate an orderly scheme of the purposes, methods, and ideas common to every system of positive law. The attempt will be made to demonstrate that while, as Holland contends, “a system of Jurisprudence might conceivably be constructed from the observation of one system of law only, at one epoch of its growth,” as a matter of fact, such has not been the method of its historical evolution. As the science of positive law is a Roman creation,⁴ Jurisprudence

¹ *The Races of Man and their Geographical Distribution*, p. 8.

² See Max Müller's comments upon the work of Frederick Schlegel in *Science of Language*, p. 165.

³ Holland, *Elements of Jurisprudence*, p. 8. Despite Pollock's criticism (*Essays in Jurisprudence and Ethics*, p. 4), Holland's illustration is perhaps on the whole the best possible.

⁴ Such is Maine's declaration. *Ancient Law*, p. 343. “Long before the year 300, Jurisprudence, the one science of the Romans, was stricken with sterility; it

a Roman invention, we must, according to the Historical Method, begin with an examination of the actual conditions at Rome out of which the science in question arose, in order to illustrate by the facts of history the nature of the processes through which it works out its results.

3. It was a fundamental principle of the ancient city-state that its law was the exclusive possession of its citizens in which a foreigner had no right whatever to participate. At Rome that body of indigenous and exclusive law, known as the *jus civile*, was administered by the *praetor urbanus* only between Roman and Roman. Perhaps no other kind of law would ever have been necessary had it not been for the peculiar situation of a city which soon made it one of the great emporiums of the Mediterranean world. Camillus is reported to have said that "not without reason did the gods and men select this site for the foundation of Rome — healthful hills, a convenient river equally adapted to maritime and inland trade, the sea not too far off to present an active international commerce, nor so near as to expose the city to a sudden attack from foreign vessels; a site in the center of the peninsula, a situation made, as it were, on purpose to allow the city to become the greatest in the world." ¹ The result of such a favored situation was an influx of foreigners to Rome whose need of law compelled as early as 247 B.C. the appointment of a *praetor peregrinus*, the praetor of foreigners, whose duty it became to administer justice between Roman citizens and foreigners and between citizens of different cities within the Empire. As such praetor could not rely upon the law of any one city for the criteria of his judgments, he naturally turned his eyes to the codes of all the cities from which came the swarm of litigants before him. While the laws and customs of the Italic cities were no doubt similar to those of Rome herself,

Making of
the Roman
jus gentium.

Rome's
relation to
commerce.

The *praetor
peregrinus*.

was sharing the fate of art." Pollock and Maitland, *History of English Law*, i. 3.

¹ Liv. v. 354.

those of the Egyptians, Carthaginians, and Syrians were marked by many peculiar features all their own. Between the two extremes stood the best standards of comparison in the laws and customs of the Greek cities which, while varying a good deal in detail from city to city, seem to have borne a family resemblance to one another.¹ Thus we encounter what is perhaps the earliest application of Comparative Law, employed for the purpose of extracting from the codes of all the nations with which the Romans were brought into commercial contact a body of principles which came to be known as the *jus gentium*, law common to all nations.² Before this new growth, watered by the learning of the jurisconsults, reached its maturity, the intellectual life of Rome passed under the dominion of her subjects in Attica and Peloponnesos, just after they had yielded to the ascendancy of the Stoic Philosophers who were ever striving to discover in the operations of nature, physical, moral, and intellectual, some uniform and universal force pervading all things that could be designated as the law of nature

Earliest
application
of Compar-
ative Law.

Stoic
philosophy.

¹ "This *jus gentium*, or body of rights, possessed by man as a citizen of the world, was a code of private international law, and it cannot be regarded as being even purely Italian. A nation that borrowed its alphabet from a Chalcidian city, that imitated the military organization of the Hellenes, that traded in the sixth century with Sicily, Sardinia, Libya, and Carthage, must have been deeply imbued with the customs of the Greek and Phoenician world. Nor was this code a growth of Rome's supremacy, for her commercial preceded her political greatness. Its origin dates back to a time probably anterior to the Republic, certainly far earlier than the institution of the praetorship." Greenidge, *Roman Public Life*, p. 294.

² It seems to be clear that such a conception was well defined as early as the second century B.C. Cic. *De Off.* iii. 69-171. Cf. Professor Nettleship, *Journal of Philology*, xii. 169; Voigt, *Das Jus Naturale*, *passim*. "Towards the end of the republican period, it would seem not before Cicero's time, it became the special name of the rules administered by Roman magistrates in causes where Roman law proper was inapplicable, by reason of the parties not being both Roman citizens or allies, or otherwise." Pollock, *Introduction and Notes to Maine's "Ancient Law,"* p. 11. And here we should keep in mind Mr. Bryce's suggestion that "the Romans did not, when they referred any particular institution to the *jus gentium*, necessarily intend to convey that it was universally prevalent. The origin of *hypotheca*, for instance (mortgage of immovables), and of the *syngraphe* (written acknowledgment of a debt) was due to Greek usage, and by no means general over the world." *Studies in History and Jurisprudence*, pp. 583-584.

—the embodiment of universal reason. With the growth of the dominion of Rome and the consequent necessity for the extension of the code of a single city to many cities, there was a natural craving for the discovery of legal principles capable of universal application. In response to such a demand Comparative Law collected the data, and a certain branch of Greek philosophy supplied the theory upon which they could be worked into a consistent whole. Thus assisted, the Roman juriconsults constructed out of the elements common to the laws of all nations the *jus gentium*, a body of principles entirely distinct from the indigenous code which the Roman state had established for itself. Before the end of the Republic the *jus gentium* had assumed definite form, and Cicero, who was the first to describe it, says that “our ancestors distinguished the law of citizens from the law of the nations, that which is proper to citizens not being therewith part of the law of the nations, whereas that which belongs to the law of the nations ought to belong to the law of citizens also.”¹ At a later stage of its growth Gaius said: “For that law which any nation establishes for itself is its own proper law and is called *jus civile*, being the peculiar law of that state; but that which natural reason establishes among mankind in general is uniformly observed by all people, and is called *jus gentium*, as that law which all nations observe.”² Such was the origin and such the nature of the first set of principles which can be said to embody a philosophy of law. As such principles were the result of generalizations upon elements common to the laws of all nations, their existence was supposed to indicate

Definitions
of *jus
gentium* by
Cicero

and Gaius.

¹ Itaque majores aliud *jus gentium*, aliud *jus civile* esse voluerunt. Quod civile non idem continuo gentium, quod autem gentium, idem civile esse debet (*De Off.* iii. 17, 69). In another place Cicero declares that the *jus gentium*, like parts of the *jus civile*, is unwritten, i.e. not included in statutory enactments. *Orat. Partit.* xxxvii. 130.

² Nam quod quisque populus ipse sibi *jus* constituit, id ipsius proprium est vocaturque *jus civile* quasi *jus proprium* ipsius civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur vocaturque *jus gentium*, quasi quo jure omnes gentes utuntur. *Institutes*, i. 1.

Effect of
jus gentium
on *jus civile*.

Jurispru-
dence an
applied
science.

a similarity in the needs and legal conceptions of all peoples. The philosophic element was the Stoic conception of a law of nature, a universal code from which all particular systems were supposed to be derived and to which all tended to assimilate. By the broad conceptions embodied in the *jus gentium* the strict and narrow archaic law of Rome was so enriched and expanded that in time the *jus civile* was largely superseded. Finally it could be said: "Roman law was finished; the local law of the city had passed into a law available for the world in general."¹ From the foregoing we ascertain (1) that the growth of the dominion of Rome and consequent necessity for the extension of the law of a single city to many cities prompted the discovery of legal principles capable of universal application; (2) that the handmaiden who gathered the materials to which the analytical Science of Jurisprudence was applied was Comparative Law; (3) that the function performed by that science was the formulation from data thus gathered of an orderly scheme of the purposes, methods, and juristic ideas common to every system of positive law to the end that there might be a uniform conception of legal right; (4) that the first fruit of the application of the Science of Jurisprudence to the data gathered by Comparative Law at Rome was the *jus gentium*. It follows therefore that Jurisprudence is from its very nature an applied science whose generalizations must be made anew whenever the data change through the creation of new systems of positive law. The motive for the application of the science is eternal, the establishment of a uniform conception of legal right, while the occasion for its application must depend upon the growth out of progressive history of such new relations of mankind as are generally recognized as having legal consequences. If it be necessary to defend the assertion that Jurisprudence is an applied science, it may be stated, in the words of Emerson, that "science is

¹ Sohm, *Institutes*, p. 86.

nothing but the finding of analogy, identity in the most remote parts." ¹ It is called *applied* "when its laws are employed and exemplified in dealing with concrete phenomena, as opposed to *pure science*, as mathematics, when it treats of laws or general statements apart from particular instances." ² As Jurisprudence must be applied and reapplied to concrete phenomena which is ever changing, it can hardly be denied that, as a science, it is at once applied and analytical. It is equally evident that, as a science, it is a unity indivisible into "general" and "particular." Such meaningless phrases as "particular jurisprudence," "equity jurisprudence," "criminal jurisprudence," should be corrected by the substitution in such phrases of the word "law" for Jurisprudence. After sanctioning such inadmissible divisions, which Holland so justly condemns, ³ Dillon has well said: "Shortly stated, Jurisprudence is concerned with the whole body of the law and signifies the science of law, or the scientific knowledge of jural relations and the legal principles, doctrines, and rules which govern such relations." ⁴ In the light of the foregoing the Science of Jurisprudence may be defined to be an analytical and applied science, which must be applied and reapplied to the data collected by Comparative Law as often as it may be necessary to extract from the mass of details, embodied at any given epoch in the then existing systems of positive law, the comparatively few basic ideas underlying the infinite variety of legal rules. As such basic ideas seemed to be bottomed in the common nature of man, there is ground for the hope that ultimately there may emerge, in the modern world as in the ancient, a common and universal conception of legal right.

As a science it is indivisible.

Science of Jurisprudence defined.

4. To Cicero we are indebted not only for the earliest definitions of the *jus gentium*, but for the best indication of the processes through which the Science of Jurisprudence evolved it

Cicero's conception of a philosophy of law.

¹ *Miscellanies*, p. 75.

² *Century Dictionary and Cyclopedia*, "Science."

³ *Elements of Jurisprudence*, pp. 10, 13.

⁴ *Laws and Jurisprudence of England and America*, p. 21.

from the materials collected at Rome by Comparative Law. Besides the definitions quoted already, there is the more famous one in which he says that the *jus gentium* is not one law for Rome and another law for Athens, one law to-day and another law to-morrow, but one eternal and immortal law for all time and for all nations, just as God, the common master and ruler of all, is one.¹ Here we have a clear recognition not only of the presence of the material elements common to the codes of all city-states, but of the Stoic theory of a universal law of nature identical, as Chrysippus says, with Zeus, the supreme administrator of the universe.² In addition to such definitions we find in a chapter of the *De Oratore* a graphic and detailed statement of Cicero's ideal of a comprehensive and philosophic treatise upon the entire body of Roman law, which he said he hoped would be written either by his own or some other hand. That remarkable chapter which defies abridgment, and to which due attention has never been given, is as follows: "The knowledge of almost all the things, which are now reduced to sciences, was once scattered and dispersed; for instance, in music, rhythm, pitch, and melody; in geometry, lines, figures, distances, and magnitudes; in astronomy, the revolutions of the heavens, the risings, settings, and movements of the stars; in the study of literature, the handling of the poets, the knowledge of history, the explanation of words, viz. etymology and grammar, the sounds to be pronounced; finally, in this very art of rhetoric of which we are talking, the invention, expression, arrangement, memorizing, and delivery

A chapter
from *De*
Oratore.

¹ Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore una lex, et sempiterna, et immortalis, continebit, unusque erit communis quasi magister et imperator omnium Deus. Fragment of his *De Republica* preserved by Lactantius, Div. Inst. vi. 8, 7. Cicero "succeeded admirably in transcribing the current ideas of the Greek schools, especially those of the Stoics, in a language far more attractive and eloquent than that of his post-Aristotelian models." Pollock, *History of the Science of Politics*, p. 31.

² Cf. Chrysippus, *Apud Plut. de Stoic. Rep.* 9; *Apud Diog. Laert.*, vii. 88.

seem to have been at one time unknown to all, or at least the knowledge of them seems to have been entirely unconnected. *Therefore there was applied from without a science of a different genus, which the philosophers claim as entirely their own, a science of such a nature as to cement and bind by a system the parts of a subject hitherto unconnected or even torn apart.*¹ Therefore let us take the final end of the *jus civile* to be this, the preservation in the dealings and disputes of citizens of an equity based on law and custom. Then its genera must be reduced to a fixed number and one as small as possible. A genus is that which embraces two or more divisions (*partes*) alike in possessing certain qualities in common but differing in species.² The divisions are subordinate to the genera from which they proceed, and the force possessed by all names of the genera and divisions must be set forth in definitions. A definition is a brief but comprehensive statement of those qualities which are peculiar to the thing we wish to define. To this I should add examples were I not well acquainted with my hearers. As it is, I shall put into a few words what I have proposed. If I should be permitted to do what I have long been planning, or if somebody else should undertake the task while I am otherwise engaged, or accomplish it after my death — as soon as some one shall divide the whole *jus civile* into its genera, which are very few, next distribute what we may call the members of these genera, and then set forth in definitions the proper force of each (term employed), you will have a perfected science of the *jus civile*, large and full indeed, but neither difficult nor obscure. In the mean-

¹ Adhibita est igitur ars quaedam extrinsecus ex alio genere quodam; quod sibi totum philosophi adsumunt, quae rem dissolutam divolsamque conglutinet et ratione quadam constringeret.

² Place in juxtaposition Pollock's statement: "He (Maine) showed, on the one hand, that legal ideas and institutions have a real course of development as much as the genera and species of living creatures, and in every stage of that development have their normal characters." *Introduction and Notes to Maine's "Ancient Law,"* p. viii. Cicero saw dimly what Maine saw clearly.

time, while the scattered fragments are being combined, a person may get a truly scientific knowledge of civil law (*justa juris civilis scientia*), if he will only cull and gather what he can here, there, and everywhere."¹

Essence
of Cicero's
unexecuted
plan.

Where in the juristic literature of our own time can be found a description of what is now known as the philosophy of law more terse and lucid than that in which Cicero says: "Therefore there was applied from without a science of a different genus, which the philosophers claim as entirely their own, a science of such a nature as to cement and bind by a system the parts of a subject hitherto unconnected or even torn apart. . . . A person may get a truly scientific knowledge of civil law (*justa juris civilis scientia*) if he will only cull and gather what he can here, there, and everywhere." By the aid of that extrinsic science, called herein the Science of Jurisprudence, Cicero proposed first to analyze the entire body of separate and uncombined principles lying at the foundation of Roman law, and then to rearrange and unite them in one harmonious and philosophic whole. Despite the fact that neither Cicero nor any later philosopher, Greek or Roman, Academic or Stoic, ever actually made such a treatise as he designed, is it fair for Mr. Bryce to say that there was "No Philosophy of Law among the Roman Jurists," especially when, in describing the Comparative Method, he admits that "the process is something like that which a Roman praetor might have followed in constructing the general or theoretical part of his *jus gentium*. If, indeed, we are to suppose the praetor ever really did study the laws of the various neighbors of Rome, he was one of the founders of this method, though to be sure the Roman commissioners, who are said to have been sent out to examine the laws of other countries before the Decemviral legislation, preceded him in this

Bryce's
untenable
conclusion.

¹ *De Orat.*, i. 42. Unfortunately Cicero's treatise, *De Jure Civile in Artem redigendo*, mentioned by A. Gellius, i. 22, is lost.

attempt.”¹ Why should there be either doubt or hesitation as to the fact that the *praetor peregrinus* did actually evolve the *jus gentium* through the application of the Science of Jurisprudence, no doubt in an incipient form, to the data collected at Rome by Comparative Law? The comparative anatomist does not falter in the making of his reconstructions because a bone is missing here and there. The power to close up such gaps, to supply such deficiencies, represents the true value of his art. There is no good reason to doubt that, through the application of the incipient Science of Jurisprudence to the data collected by Comparative Law, the Roman jurists were able to extract from the various codes of the cities with which Rome came into commercial contact a set of principles embodying the general conceptions of legal right then dominant in the ancient world. After the lapse of twenty centuries a new system of codes, far greater in number and far more voluminous in detail, have come into existence, from which the jurists of to-day should be able to extract, through a reapplication of the Roman method, the comparatively few basic principles which underlie them all. As more rapid intercommunication draws the nations of the world closer together, the longing increases for a uniform conception of legal right which must emerge, if at all, from the existing codes like the single and typical face in a composite photograph to which many features have contributed their influence. In order to work out such a result Comparative Law must first collect the data from all existing codes; then to the data thus collected the Science of Jurisprudence must be so applied as to extract those fundamental conceptions which, as essentials, lie at the base of all legal systems, such as obligation, duty, right, law, liability, custom. From these more general conceptions the process must be extended to a second order of ideas, more purely legal, such as

Necessity
for a
modern
jus gentium.

How that
result may
be attained.

¹ *Studies in History and Jurisprudence*, pp. xix, 619. See also p. 607. There he says, “Where is the legal philosophy of the Romans to be found?”

possession, ownership, sales, contract, conveyance, marriage, guardianship, inheritance, crime, fraud, negligence, pledge, lien, prescription, bailment, and partnership. These basic conceptions, which can thus be stated within a comparatively narrow compass, with a few others of minor importance, appear in every fully developed legal system and thus constitute the subject-matter to which the Science of Jurisprudence must be applied. If, through a reapplication of that science to data collected by Comparative Law from all existing codes, a new *jus gentium* should be established for the modern world embodying a uniform conception of legal right, there could be no difference of view as to the inestimable value of the result. The only question is as to the possibility of its attainment. The basis for such a hope is in the fact that while, as will be pointed out in the next section, there are five original law systems from which existing codes are derived, there are but two in which the more important nations are really concerned. Roman and English law are now extended over perhaps nine tenths of the globe. These two systems, the one originating in the code of a single Italian city, the other in the customs of a group of Teutonic tribes, practically divide the world between them.

One basis
for hope.

Five orig-
inal law
systems.

5. If it be true that the Science of Jurisprudence should be applied to the entire data which Comparative Law collects and tabulates from the legal institutions of existing states, the first inquiry to be made is this: What are the existing systems of positive law from which such data must be drawn? Viewing the matter from the standpoint of Comparative Law, there are five original systems from which the laws of the different countries are derived, which may be thus arranged in the order of their relative importance: (1) the Roman law system; (2) the English law system; (3) the Muhammedan law system; (4) the Hindu law system; and (5) the Chinese law system. Leaving China out of view, isolated as she is with customs all

Chinese
law.

her own, Turkey, North Africa, Persia, Western Turkestan, and Afghanistan may be designed as the countries which obey the sacred law of Islam, where law is religion and religion law, their equal authority resulting from their common origin in the same divine revelation.¹ When the English began the conquest of India, they found two great systems of customary law, Hindu and Mussulman, there existing side by side, together with other minor bodies of customs prevailing among particular sects. In the Hindu principalities Hindu law was dominant, and the Hindu law of family relations and of inheritance was recognized as that by which the Hindus lived, even where the sovereign was a Mussulman. British officials, accepting what they found, applied Mussulman law to Mussulmans, Hindu law to Hindus, and in the few places where they were to be found, Parsi law to Parsis, Jain law to Jains. Personal law upon the basis of creed was thus applied, as personal law upon the basis of race had been applied in Europe in the sixth century to ² Franks, Burgundians, and Romanized Gauls. And so matters remain in India to this day as to those parts of the law which are interlaced with religion, marriage, adoption (among Hindus), and other family relations, and with the succession to property.³ In a law review now published at Allahabad may be read from month to month cases thus decided under Hindu and Muhammedan law in the Indian courts of English creation, subject to appeal to the English Privy Council.⁴ In describing the many different kinds of law applied by that far-reaching body, M. Speyer has recently said: "De même le Comité judiciaire du Conseil privé, en sa

Muham-
medan law.

Hindu law.

Law
systems
of India.

English
Privy
Council.

¹ Cf. Rodolphe Dareste, *Études d'Histoire du Droit*, iii., *Le Droit Musulman*.

² "In the British India of to-day we may see, and on a grand scale, what might be called a system of personal laws, or racial laws." Pollock and Maitland, *History of English Law*, i. 15, 2d ed.

³ Bryce, *Studies in History and Jurisprudence*, pp. 97 sq. See also Dareste, *Études d'Histoire du Droit*, iv., *Les Anciens Codes Brahmaniques*.

⁴ See No. 20, December, 1905, of the *Allahabad Law Journal*, pp. 798, 810. In the case first cited Hindu law was applied to the construction of a deed of gift; in the second Muhammedan law was applied to a question of succession.

qualité de tribunal colonial supreme, applique avec une égale impartialité tantôt la législation française de la province de Québec, tantôt le droit romano-hollandais de la colonie du Cap, ou encore les coutumes boudhistes, le droit musulman et les lois ultra-modernes des colonies australiennes, de sorte qu'il en arrive ainsi à interpréter, en une même audience, un passage du Coran et une loi australienne appliquant les doctrines socialistes." ¹ From the outset, of course, the comparatively small body of Englishmen who have governed India applied English law to themselves. Not, however, until late in the eighteenth century did they begin to make even a limited extension of it to the native populations through a law of procedure. By an act of Parliament of 1781 the Indian government was authorized to make regulations for the conduct of the provincial courts, with the proviso that the rules and forms for the execution of process were to be adapted to the religion and manners of the natives. After failing to apply satisfactorily the penal law which the Mussulman potentates had enforced, — many of its provisions being such as no Christian government could recognize, — the English began the work of codifying the penal laws through the Indian Law Commission of 1833, of which Macaulay was the central light. The Penal Code which resulted, the noblest product of Macaulay's genius, was not enacted into law until 1860, and then through the efforts of a second commission appointed under an act of 1853, which secured also the enactment of Codes of Civil and Criminal Procedure. Partly through the efforts of a third commission appointed in 1861, the law of India has been further codified and amended through a series of enactments declaring it applicable to both Europeans and natives, notable among which are the Indian Evidence Act of 1872, drawn by Sir James Fitzjames Stephen, ² and the acts relating

English law
in India.

Indian
Law com-
missions of
1833, 1853,
1861.

¹ *La Constitution Juridique de l'Empire Colonial Britannique*, p. 243.

² See Stephen, *Digest of the Law of Evidence*, Introduction.

to the limitation of actions (1877), specific relief (1877), probate and administration (1881), and negotiable instruments (1881). Outside of the spheres covered by these enactments Englishmen, Mussulmans, and Hindus continue to live under their respective laws. When no native law or custom can be proven, the English judge naturally applies his own law in an untechnical spirit. Is the process of legal development in India to end within the limits of that compromise; or is it to continue until the law of the governing and stronger race has entirely absorbed and supplanted that of the native populations? ¹

When no native law or custom can be proven.

After all fair deductions have been made in favor of the spheres occupied by the Chinese, Muhammedan, and Hindu law systems, the fact remains that the Roman and English law systems now cover nearly the whole of the civilized, and most of the uncivilized, world. Roman private law, as modified by national or local family customs or land customs and by modern legislation, survives in substantially all the European countries which formed part either of the ancient or of the medieval Roman Empire. Its main strongholds in Western Europe are Italy, Spain, Portugal, France, Switzerland, Germany (including the German and Slavonic parts of the Austro-Hungarian monarchy), Holland, and Belgium. From Spain or Portugal it has passed to Mexico, Central America, South America, Cuba, Porto Rico, and the Philippines. From France or Holland it has passed to the Canadian province of Quebec, Louisiana, Ceylon, Mauritius, British Guiana, South Africa, French Africa, the Dutch and French East Indies. From Germany it has passed to German Africa. To these areas must be added, in Western Europe, Scotland

Roman and English law dominate the world.

Strongholds of Roman law.

¹ In attempting to answer those questions, Mr. Bryce has said: "Which of these two things will happen depends upon the future of the native religions and especially of Hinduism and of Islam, for it is in religion that the legal customs of the natives have their roots." *Studies in History and Jurisprudence*, p. 118.

Strong-
holds of
English law.

Possibility
of a
universal
code of
private law.

And of civil
procedure.

which, since the establishment of the Court of Session in 1532, has built up its law out of Roman civil and to some slight extent Roman canon law materials. As outlying provinces, more or less closely connected with the system of Roman private law, may be mentioned Greece, Servia, Bulgaria, Roumania, Russia, Poland, the Scandinavian countries, and Japan, as will be more fully explained hereafter. The strongholds of English law are England, Wales, and Ireland, and most of the British colonies, including Australia, New Zealand, and all Canada except Quebec; and the United States of America, except Louisiana, and the new dependencies in which Roman or native law is administered. It thus appears that the Roman and English law systems prevail in every country now asserting any appreciable influence upon modern civilization. While the area occupied by Roman law and its dependencies is the wider of the two, the fact cannot be ignored that by the rapid growth of the United States and the British colonies and the extension of English law in India that relation may be reversed in the not far-distant future. What is to be the ultimate outcome? Is one system to supersede or supplant the other; or is there to be an assimilation out of which there shall arise a universal code of private law, embodying a system of rules substantially identical as to property and contracts, enforceable through a uniform system of civil procedure? For centuries the process of assimilation has been advancing through the absorption, as will be demonstrated hereafter in detail, by the English system of masses of Roman law materials which have been embedded in the equitable, canonical, admiralty, and commercial branches of English law to an extent never fully realized or at least admitted until very recent times. The commercial law of all civilized nations is everywhere substantially the same, and nothing is more marked than the tendency now growing among English-speaking peoples on both sides of the Atlantic to substitute for com-

mon law pleading the more convenient and reasonable forms of procedure in use during the later Empire, and now known in the United States as "the reformed code procedure." There is an equally strong tendency here, in the commercial cities, to withdraw complicated business transactions from the consideration of juries in order to submit them to a referee (*judex*). Long ago there was a revival in the English universities of the study of Roman law, which has extended to this country where interest has been quickened in the subject by the closer relations recently established with Cuba, Porto Rico, and the Philippines. All jurists of the more ambitious kind within the English-speaking world now understand that in order to be fully equipped they must master, to a reasonable extent at least, Roman as well as English law. Following the method prescribed by the Historical School, an effort will be made in the two following chapters to draw out, within narrow limits, the external histories first of Roman and then of English law, considered as continuous evolutions, as connected wholes, special emphasis being given to the time and manner in which the latter has been enriched and expanded by materials drawn from the former. Only through such a method of comparative study can the student of the Science of Jurisprudence supply himself with the materials necessary for his deductions.

Disuse of
juries in
civil cases.

Study of
Roman law
in English-
speaking
world.

CHAPTER III

EXTERNAL HISTORY OF ROMAN LAW

Failure of
the Greeks
to produce a
philosophy
of law.

No imposing
legal
monuments.

1. It cannot be denied that the Greeks produced nothing to which the term "Jurisprudence," as the name of a science, could possibly be applied. And yet the growth of law began, no doubt, in Greece earlier than in Italy, and up to a certain point it may have developed more brilliantly. If the Greeks had succeeded in building up an extensive and powerful empire, the outcome might have been a great codification that would have rendered unnecessary the compilations of Justinian. But the fact is that no such thing happened. The Greeks left behind them no complete or imposing legal monuments; they produced nothing which, in any proper sense, could be called a philosophy of law. Of their conceptions of law and procedure we can only catch glimpses from the Homeric poems, from the fragments that remain of the Hellenic codes, from the details of law and practice found in the orations of Demosthenes and other Greek orators, from what Plato tells us in the *Dialogues*, the *Republic*, and the *Laws*, from the fragments of a legal treatise by Theophrastus, referred to in the first book of the *Digest* of Justinian, and from the outlines of public law to be traced in the politics of Aristotle.¹ In the Greek system of city-states, internally organized after one general model, were contained the conditions with which Aristotle, the acknowledged founder of political science, was brought into contact, and in obedience to his practical temper, he begins his speculations with a description of the forms

¹ Upon the whole subject, see *La Science du Droit en Grèce, Platon, Aristote, Théophraste*, by Rodolphe Dareste. Paris, 1893.

of government actually existing around him. It is probable that in order to collect sufficient data to support the statements and conclusions contained in his *Politics*, he made, as a preparatory study thereto, the collection called the Constitutions, which is said to have contained a description of the organization, manners, and customs of one hundred and fifty-eight states or cities.¹ The Greek city-state, like all others of its type, had its common worship, its public property, and its customary law whose roots struck deep down into the institutions of patriarchal times. The customary law, the blended product of religious and secular elements, which regulated within the city-state persons in family, clan, and tribe, and things in the same relations and jurisdiction, steadily developed, as in other parts of the Mediterranean world, down to that epoch in which it crystallized into the written codes that appeared in Greece, in Italy, and on the Hellenized seaboard of Western Asia at periods similar in point of the relative progress of each community. Everywhere in the countries named, probably as the result of the discovery and diffusion of the art of writing, the archaic rules of customary law reposing in the recollection of privileged oligarchies were engraved on tablets and published to the people.² And here a sharp distinction should be drawn between such customs as took organic form in response to the conditions and exigencies of the social life of family, clan, and tribe within the ancient city and those that grew out of the affairs of trade and commerce with the outer world. Alongside of the unelastic written codes, into which were condensed domestic and interior usages, the Greeks, who were a busy, commercial people, developed another kind of customary law, consisting of the usages of trader, merchant,

Aristotle's
Constitutions.

Customary
law.

Written
codes.

Commercial
usages.

¹ The main body of materials thus collected has been lost, but the fragments which remain have been collected and annotated by Neumann, and are contained in Bekker's Oxford edition of Aristotle.

² As to these early codes, see Maine, *Ancient Law*, pp. 13-20, and Pollock, *Introduction and Notes to Maine's "Ancient Law,"* pp. 4-7.

and mariner, that tended to facilitate commercial dealings between man and man, without regard to the lines of family, race, or nation. It is more than probable that Greek commercial usages were influenced by those of Egypt, Phoenicia, and Carthage; and in Greek literature allusions are to be found to commercial agents or consuls in foreign ports, to societies that may have been something like insurance companies, and to loans on bottomry. And if etymology can be accepted as a safe guide, we may infer that certain contracts, which we find in the Roman *jus gentium*, — such as *chirographum*, an acknowledgment signed by the debtor, *syngrapha*, signed by both creditor and debtor, and *hypotheca*, compared in its early stages to a chattel mortgage, — came from Greek commercial law, which was rich in the invention of methods for utilizing credit.¹ When a piece of real estate is delivered to a pledgee so that he may hold it as security and apply its revenues to the debt, the contract is still called in some modern countries by its Greek name, *antichresis*.² And it is probable that the conception of the tenure under which were held frontier lands granted by the Roman Empire to soldiers upon condition of their rendering military service in border warfare was of Greek origin.³ While the aristocratic and agricultural states were adverse to the admission of strangers on any terms, the commercial ones favored their introduction. On the one hand, Sparta in her earlier days forbade her citizens to go abroad and refused to permit strangers to reside within her bounds;⁴ on the other, Athens allowed

Military
tenures.

¹ I refer with pleasure to the profound *Studies in the Civil Law*, by my friend, William W. Howe, LL.D., of the New Orleans bar, pp. 91-93.

² Sohm, *Institutes*, p. 276.

³ "Probably the conception of the tenure under which such soldiers held their lands was borrowed to some extent from the attributes of the interest in land called *emphyteusis*." Digby, *Law of Real Property*, p. 30. "Emphyteusis (*ἐμψύτευσις*), literally an 'implanting,' is a perpetual right in a piece of land that is the property of another," etc. Smith's *Dictionary of Greek and Roman Antiquities*, p. 400. See also *Institutes*, iii. 25, 3 Cooper's notes.

⁴ Plut. *Agesilaus*, 10; *Lycurgus*, c. 27; Thuc. i. 144.

her domiciled aliens (μετοικοί) to enjoy her laws through the agency of a patron (προστάτης), subject, however, to a stranger's tax, and to military service by land and sea.¹ The commercial communities in Greece so far favored the admission of peaceful aliens within their walls as to enter into international conventions providing for the mutual administration of justice to resident foreigners, for the establishment of mixed tribunals, or even for the grant of isopolity.² In "Greek diplomacy, which, considering the ground it covers, is vastly fuller than that of modern times, . . . there were eight or ten technical terms to express the different sorts of treaties into which nations might enter."³ From the following precise and accurate definitions it appears that the Greeks had a clear understanding of the nature of positive law. "Whatsoever the ruling part of the state, after deliberating as to what ought to be done, shall enact, is called law."⁴ "Law is a definite proposition, in pursuance of a common agreement of a state, intimating how everything should be done."⁵

Resident
foreigners
and treaty
making.

Defini-
tions of
positive law.

Over and above these positive laws, set by men for men, stood, in the mind of the Greek, the unwritten and steadfast customs of the gods, to which men could appeal for justice. When King Creon, in reproaching Antigone for having scattered ashes upon the body of her brother, asked, "And thou didst dare to disobey these laws?" she answered:—

"Yes, for it was not Zeus who gave them forth,
Nor Justice, dwelling with the Gods below,
Who traced these laws for all the sons of men;

¹ Thuc. iii. 16. Cf. Plut. c. 37.

² Arist. *Pol.* iii. 1. 3; 5. 10. The word *ισοπολιτεία* is also used by Plutarch (ii. 300), and means "equality of civic rights."

³ Professor H. B. Leech, *Essay on Ancient International Law*, p. 22.

⁴ "Ὅσα γὰν τὸ κρατοῦν τῆς πόλεως βουλευσάμενον ἂ χρὴ ποιεῖν γράψῃ, νόμος καλεῖται. Xenophon, *Mem.* i. 2. 43.

⁵ "Ὁ νόμος ἐστὶ λόγος ὠρισμένος, καθ' ὁμολογίαν κοινὴν πόλεως, μνηνὼν πῶς δεῖ πράττειν ἕκαστα. Anaximenes, *Arist. Rhet. ad Alex.* c. i. See also Demosthenes, *Adv. Aristogeit.* (p. 774); *Dig.* i. 3. 2. Cf. Holland, *Elements of Jurisprudence*, pp. 41–43, for further illustrations.

Nor did I deem thy edicts strong enough,
 That thou, a mortal man, shouldst over-pass
 The unwritten laws of God that know not change.
 They are not of to-day or yesterday,
 But live forever, nor can man assign
 When first they sprang to being."¹

And yet after every advance made by the Greeks, either upon the practical or theoretical side, in the effort to establish anything like a science of positive law has been estimated at its full value, the fact remains that no such result was attained.² With the aid of all that can be drawn from the imperfect survivals heretofore described, distinguished as they are by a lack of order and by an inability to sever law from morality and religion, it is hard to negative the assertion that neither the Greeks themselves nor any society thinking or speaking in their language ever developed the smallest capacity for producing anything like a philosophic system of jurisprudence. It was reserved for the Romans to present to the world the science of positive law as an original contribution.

Roman
 constitution
 in the regal
 period.

2. The beginnings of Roman law are embedded in the traditional history of the great city-state that arose on the banks of the Tiber out of the union of a group or groups of village communities which certainly coalesced upon the general plan dominant in the Greek and Italian peninsulas. In Italy the village community appears as the *gens*; out of a union of *gentes* arose the tribe; out of a union of tribes arose the city-state. It seems to be clear that the Italian city was rather the fortress, the place of meeting, the place of shelter, of the tribe or collection of tribes, than the actual home and dwelling

¹ Sophocles, *Antigone*, ll. 449-460. Plumptre's translation, p. 145.

² "There cannot well be a science of law without such a profession (*i.e.* a distinct profession of lawyers, whether as judges or advocates). . . . In Athens, at the time of Pericles, and even of Demosthenes, there was a great deal of law, but no class of persons answering to our judges or counselors. The Attic orator was not a lawyer in the modern sense." Pollock and Maitland, *History of English Law*, Intro. p. xxvii.

place which it was according to Greek ideas.¹ A group of Latin villages grew together to form a border fortress of Latiun on the Etruscan march.² In the Latin city of Rome, which gathered around it the various classes of citizens, half-citizens, allies, and subjects, all looking to the local city as the common center, the idea of the single independent city — the ruling city — reached its highest development. That the people so united were in the main homogeneous, and in the main of Latin descent, seems to be unquestionable. The evidence of the language, the religion, the institutions, and civilization of early Rome points to the conclusion that its immediate progenitors were the Latin Lavinium and the Latin Alba. As to the tradition which insists on the admixture of at least two non-Latin elements, a Sabine and an Etruscan, it may be said that the substance of the tradition, so far as it relates to the Sabine element, is supported by the great majority of modern writers, including even Mommsen who, while admitting its possibility, throws back the time of its occurrence to an earlier period than that of the union of the two settlements.³ In the structure of the early Roman state the marks of the fusion of communities are more distinct than the traces of the admixture of races. No one can tell how long the process of federation was in progress, while of the constitution and history of the united state in the early days of its existence it is impossible to give more than a meager outline. According to tradition the *populus Romanus* was divided into three tribes, Ramnes, Titienses, and Luceres,⁴ and into

Rome as an independent city-state.

Its Latin origin.

Fusion of communities.

Division into tribes and *curiae*.

¹ "The Latins began with a *Markgenossenschaft*, and the town, like the British *oppidum*, was at first a mere place of defense in case of the attacks of enemies." Freeman, *Comparative Politics*, p. 257.

² That is the view of Mommsen. See chapter three of his *Römische Geschichte*.

³ *Römische Geschichte*, i. 43. Gilbert (*Topographie*, i. c. 5) accepts the Sabine settlement, but holds correctly that in the union the Latin element decisively predominated.

⁴ The original legend, the topography of which there seems to be no good reason to doubt, comes out in Dionysius, ii. 50. For Mommsen's treatment of it, see *Römische Geschichte*, i. 33.

thirty *curiae* — each *curia* representing a group of *gentes*, and each *gens* a group of families. While the traditional statement that the *curia* was formally divided into a fixed number of *gentes* and families rests on no substantial historical foundation, it is clear that the gentile organization was common to the two races, at least, that contributed most largely to the citizenship of Rome, and that it was the basis of the new arrangement.¹ The *curia*, whose members were probably neighbors and kinsmen, is generally regarded as the keystone of the primitive political system, and it doubtless represents a stage in political development midway between that in which clanship is the sole bond of union and that in which such claims as those of territorial contiguity and ownership of land have obtained recognition. Even in Cicero's time there were still curies, curial festivals, and curiate assemblies. As a primitive association the *curia*, which possessed common festivals, common priests, and a common chapel, hall, and hearth, was held together by participation in common *sacra*.² The members of the thirty *curiae* constituted the *populus Romanus*, and the earliest known condition of Roman citizenship is the *communio sacrorum*, partnership in the curial *sacra*. The soundest view is that the primitive Roman people of the thirty *curiae* included all the freemen of the community, simple as well as gentle.³

Curia the
keystone.

The *populus*
Romanus.

Elective
kingship.

The common chieftain, whose appointment federation made necessary, was the *rex*, the ruler of the united people.⁴

¹ "But, although the *curiae* had local centers, membership of these bodies did not depend on residence in a given locality. It was hereditary; and if the members of a *gens* migrated from its *curia*, the *gentiles* were still members of that state division." Greenidge, *Roman Public Life*, p. 41.

² Festus, pp. 49, 62, 64. The *curio maximus* was the president of a college formed by the thirty *curiones*. Festus, p. 126; Liv. xxvii. 8.

³ Cf. Mommsen (*Römische Forschungen*, vol. i.), as to the vexed question of the purely patrician character of the *curiae*.

⁴ That he was once the priestly head of a community bound together by common *sacra* is manifest from the survival of a *rex sacrificulus*, as he appears in Livy, vi. 41. But that his real title was *rex sacrorum* appears from Livy himself (xxvii. 6).

The terms *interrex* and *interregnum* go far to prove not only that Rome once had kings, but that those kings were elective and not hereditary. There must have been a time when the *interrex* really was, as his name implies, the magistrate who was to preside at the election, not of consuls, but of a king. When, in later times, there were no "patrician magistrates" to hold elections for their successors, a procedure was adopted which we have every reason to believe represented the manner in which the early kings were chosen.¹ When the king died, the supreme authority reverted to the council of elders, the *patres*, who, representing the *gentes*, appointed an *interrex*, who in turn nominated a second, or even a third or fourth, by whom a king was selected in consultation with the elders. The king-elect was then offered to the freemen assembled by their *curiae* for their formal acceptance, which was ratified by the *patres*, as security that the *sacra* had been respected of which they were guardians.² When once installed the *rex* was the sole ruler for life, the religious head of the state, the absolute leader in war, the supreme judge who settled all disputes, and punished wrongdoers even with death. His duty it was to offer the solemn sacrifices, to consult the gods, to announce the days of public festivals, and to impose taxes.³ The vestal virgins guarded the sacred fire on the common hearth of the state which was near his dwelling place. In the discharge of the manifold duties, secular and religious, that clustered around the royal office the king was assisted by a body of elders, a representative council of chiefs, who stood to the king as the family council to the house-father in the earliest times. The Roman senate was, no doubt, an outgrowth and expansion of that idea. The senators, the *patres*, taken from the leading *gentes*, held their offices for life, and, as the ultimate

Method of election.

Rights and duties of the *rex*.

Origin and functions of the senate.

¹ Cic. *De Leg.* iii. 3; Liv. iv. 7.

² "Patres auctores facti," Livy, i. 22.

³ Cf. Schwegler, i. 646 *sq.*

depository of the supreme power and of the *sacra* connected with it, they claimed the right to appoint the *interrex* from their own body,¹ to be consulted in the choice of the new king, and also the right to ratify the vote of the assembled freemen. Vacancies in their ranks were filled by the king to whom they could give advice and counsel only when he wished to consult them. Neither the senate nor the popular assembly of united Rome could meet except when he saw fit to convene them. In the earliest days that assembly (*comitia curiata*), in which the freemen voted by the *curia*, just as in an American convention the vote of the entire body may be taken by delegations,² met in the *comitium* at the northeast end of the forum,³ under the presidency of the king, or, in his absence, of the *interrex*. When the vote was put, the *curiae* were called in turn, and so the voting took place *curiatim*. A majority of the votes of the *curiae* determined the final result, after the will of each *curia* had been declared by a majority of its qualified members. Of the right of legislation, as that term is now understood, there is no trace in the regal period; and the right of the assembly even to elect magistrates seems to have been limited to the acceptance or rejection of the king proposed by the *interrex*. If it be true, as Dionysius says, that the assembly voted on questions of war and peace, its power in this, as in other matters, did not go beyond the final power of saying yea or nay to a definite proposition laid before it.

Popular
assembly
(*comitia
curiata*)
and its
functions.

Questions
of war
and peace.

¹ Tradition dates the *interregnum* from the first vacancy in the regal office, after the death of Romulus. Cic. *De Rep.* ii. 12, 23; Liv. i. 17; Dion. ii. 57. When such a vacancy occurred, the auspices under which the state had been founded "returned to the *patres*" (Cic. *Ad Brut.* i. 5. 4), and not to the *comitia curiata*.

² "Each individual votes in the group to which he belongs, *curia*, *centuria*, or *tribus*, as the case may be; and it is by the majority of curies, centuries, or tribes that the decision of the assembly as a whole is given, the collective voice of each of these groups being reckoned as one vote, and a small group having as much weight as a large one." Bryce, *Studies in History and Jurisprudence*, p. 711.

³ Varro, *L.L.* v. 155. For the position of the *comitium*, see Smith, *Dictionary of Geography*, s.v. "Roma," and Jordan, *Topog. d. Stadt Rom*.

The *comitia curiata* seems to have represented the legislative idea as to the primitive family, the primitive clan, and the primitive tribe, and those who clung to that idea carried on a prolonged struggle against the progressists who insisted upon the expansion of the government into a real city-state, embracing all the permanent inhabitants. In the early days it was a part of the business of the assembly to authorize and attest certain acts, which, in a later age, assumed a more private character, such as the disposal of private property by will, the solemn renunciation of family or gentile *sacra*, and adoption (*arrogatio*).¹ In the first view attainable of the Roman constitution the fact clearly appears that the supremacy of the state has been firmly established over the separate communities out of whose fusion it arose. Wrongdoers are punished and private differences are settled by state tribunals, while, even within the limits of the family, the once despotic authority of the house-father is limited by the superior claims of the state upon the services of its members. And yet, while the older order of things has passed away, its traces linger in a form that clearly indicates that Rome was not in the strict sense a city-state, but that it had in it something of a federal element, an element that clearly appears in the composition of both the senate and the assembly.²

Right to attest certain acts.

Supremacy of the state over the separate communities.

The federal element abides.

3. Roman private law, with even more distinctness than public, emphasizes the fact that the great city-state was the outcome of a process of federation in which the family was the unit or starting point. "Roman law, which, next to the Christian religion, is the most plentiful source of the rules

Roman private law in the regal period.

¹ Gaius, ii. 101; Gell. v. 19, xv. 27; cf. Cic. *Pro Domo*, 13, 14.

² "At Rome then, as in Achaia, it was perfectly possible that those citizens of a distant tribe who appeared in any particular assembly may have practically been representatives of their neighbors who stayed away, commissioned to vote on their behalf. This is one of the several points in which the Roman commonwealth, with its city franchise extended over so large a territory, has more in common with the federal than with the single commonwealths of Greece." Freeman, *Comparative Politics*, p. 146.

The
primitive
family as a
corporation.

*Patria
potestas.*

governing actual conduct throughout Western Europe, is descended from a small body of Aryan customs reduced to writing in the fifth century before Christ, and known as the Twelve Tables of Rome."¹ In order to comprehend the beginnings of that "small body of Aryan customs" we must examine first the organization of the primitive family as a corporation in which Roman private law finds its source. In early society men were not regarded as individuals but as members of a family group or household whose ruler, priest, and judge was armed with a *patria potestas* which reached its highest development in the Roman world.² There the control of the house-father involved the power of life and death (*jus vitæ necisque*),³ as well as the right of uncontrolled corporal chastisement over his children, whose personal condition he could modify at pleasure. He could give his daughter in marriage; he could give a wife to his son; he could divorce his children of either sex; he could sell them; or he could transfer them to another family by adoption. Unless the *pater familias* voluntarily put an end to it, the *patria potestas* lasted as long as he lived or retained his status. The marriage of a son, unlike that of a daughter passing into the hands of a husband, did not release him from it, nor did his children become subject to him so long as he was *in potestate*. On the other hand, his wife passed in marriage into the power of her father-in-law, and their children fell under that of their paternal grandfather, who was entitled to exercise over his daughters-in-law and grandchildren the same rights he had over his sons and unmarried daughters.

¹ Maine, *Early History of Institutions*, p. 9.

² The Roman jurists claimed that it was a right enjoyed only by Roman citizens ("*jus proprium civium Romanorum*"). Gaius, i. 55, 189; Just. *Inst.* i. 9. In the early Empire it was enjoyed by burgesses of the Latin municipalities of Spain and some other western provinces who were not Roman citizens. *Lex Salpensana (temp. Domit.)*, c. 22 (Bruns, p. 131).

³ No limitation was put upon that power until the time of the Middle Empire. Hadrian punished the killing of a son with deportation (*Dig.* 48. 8. 5); Constantine declared it *parricidium*.

Thus it appears while the children were in public life on an equality with the house-father, in private life, and so long as the *potestas* lasted, were so subordinate to him that, according to the letter of the law, they were little better than his slaves. All their earnings were his; they could have nothing of their own, although it was quite common when they grew up for him to give them *peculia*, "cattle of their own," to manage for their own benefit as *de facto* theirs, but *de jure* his. And yet the fact remains that the house-father was simply the head of the family corporation whose possessions he held simply for his children and kindred. The great rights and duties with which he was endowed were in contemplation of law quite as much those of the collective body as his own.¹ The family was a religious as well as a natural organism held together by the common worship which its members owed to the spirits of their ancestors. Hence the principles that regulated marriage, and the relation of parents to children and devolution of property had a religious basis, and were precepts of religion no less than rules of law. With the early Romans, as with the Hindus and the Greeks, marriage was a religious duty a man owed alike to his ancestors and to himself.² The prime and sacred duty of the house-father was to perpetuate the family by natural or artificial means. Anciently marriage might be contracted according to Roman usage by the religious ceremony known as *confarreatio*;³ by the higher form of civil marriage known as *coemptio*; and by the lower form known as *usus*.⁴ The rights thus acquired by the husband over the

Children but little better than slaves.

House-father as head of family corporation.

Religious duty to perpetuate it.

¹ Cf. Maine, *Ancient Law*, pp. 131 sq.; Sohm, *Institutes*, pp. 355, 385, 386-389, 390; Dion. Hal. ii. 15, 26, 27 (Bruns, p. 7); Clark, *Early Roman Law*, pp. 25, 31, 125.

² Cf. Fustel de Coulanges, *La cité antique*, pp. 41-54.

³ A woman married by the ceremony of *confarreatio*, peculiar to the patricians, became a partner in the property and *sacra* of her husband—*ἀνδρὶ κοινῶν ἀπαντῶν χρημάτων τε καὶ ἱερῶν* (Dion. ii. 25).

⁴ See Bernhöft, *ZS. f. vergleichende R. W.* viii. 197, 198 (1888), as to the origin and growth of the free marriage among the Romans.

person and property of his wife were acquired not as husband but as father. By either of the three forms of marriage the woman passed *in manum viri*; that is, she became in law the daughter of her husband, and was included in his *patria potestas*. As the Greek called his wife the house-mistress (δέσποινα), so the Roman spoke of his as the *mater familias*, the house-mother, who was treated as the husband's equal.¹ If the wife had any property of her own, it passed to the husband as a matter of course; if she had none, her *pater familias* gave her a dowry (*dos*)² which shared the same fate. If a man saw his sons go to the grave before him, or if his marriage was fruitless, it became his duty to prevent the extinction of the family by the process, so familiar in India and Greece, known as adoption — a fiction so closely simulating the reality of kinship that neither law nor opinion made the slightest difference between a real and an adoptive connection. No adoption was allowed to take place, however, without due provision for the *sacra* of the family from which the adoptive son was transferred. If it was a *pater familias* who was adopted, the process was called *adrogatio*; if it was a *filius familias*, it was simply *adoptio*. In connection with this domestic despotism the maxim of Roman law must be remembered that the *patria potestas* did not extend to the *jus publicum*.³ After the city-state was formed every man is first of all a citizen; next he is a member of a *gens*, house, or clan; and lastly he is a member of his family. Father and son voted together in the city, and fought side by side in the field where the son, as general, might happen to command the father. As a mag-

Status of
house-
mother.

Her dowry.

Adoption.

Patria potestas did not
extend to
jus publi-
cum.

¹ See Ihering, *Vorgeschichte der Indoeuropäer*, pp. 411 sq., as to Aryan influence on the early Roman matrimonial relation.

² As to the right of the wife to claim back the *dos*, see Bechmann, *Das Römische Dotalrecht*, 2 vols., 1863, 1867; Czyhlarz, *Das römische Dotalrecht*, 1870.

³ "Lastly, there was the principle that the paternal power cannot interfere with the *jus publicum*. It is a principle that applies both to persons and to property." Greenidge, *Roman Public Life*, p. 23.

istrate he might be called upon to pass upon his father's contracts and punish his delinquencies.

It is difficult to grasp the principles by which Roman law prevented the dissolution of the family as a corporation upon the death of the house-father, primogeniture not existing in any form. As the headship did not descend to the eldest son, to whom did the house-father's authority and the family estate descend? The rule was that both descended to all persons agnatically connected with him; that is, to all who had been under his paternal power or who might have been under it if their lineal ancestor had lived long enough to exercise it.¹ The group of agnates succeeded as a single unit, and the assets were afterwards divided among them in a separate legal proceeding. When the succession was *ab intestato*, and the group consisted of the children of the deceased, each took an equal share of the property. The whole law of testamentary and intestate succession circles around the fact that a man lives on in his heirs.² There is abundant evidence in archaic law to indicate that what passed from the testator to the heir was the family; that is, the aggregate of rights and duties contained in the *patria potestas* and growing out of it. The foundation of agnation was not the marriage of father and mother, but the authority of the father; where the *potes-tas* ended kinship ended. Therefore a son emancipated by his father lost all rights of agnation. If the question be asked who were the agnates, the answer is that they were all the cognates who traced their common connection exclusively through males (*per sexum virilem*). Hence the legal maxim, *Mulier est finis familiae*. A female name closes the branch of the genealogy in which it occurs. To the agnates thus obtained must be added all persons who had been brought into the

Agnatic
succession.

Group of
agnates
succeeded
as a unit.

A man
lives on
in his heirs.

Founda-
tion of
agnation
potestas.

*Mulier
est finis
familiae*

¹ "The agnates were that assemblage of persons who would have been under the patriarchal authority of some common ancestor, if he had lived long enough to exercise it." Maine, *Early History of Institutions*, p. 106.

² Maine, *Ancient Law*, pp. 144, 184, 185, 220.

family by the artificial process of adoption.¹ Upon the death of the house-father his paternal powers and possessions passed to his agnates thus ascertained. When the *pater familias* died, his sons and daughters who had remained *in potestate* and his grandchildren by a predeceased son instantly became *sui juris*, whereas grandchildren by a surviving son simply passed from the *potestas* of their grandfather into that of their father.² When it became necessary to substitute the guardianship of tutors (*tutela*) for the extinct *potestas*, it was only pupil males who required them, and their office came to an end when puberty was attained.³ While the early law recognized agnation, chiefly if not entirely, the praetors early laid hold on cognation as the natural form of kinship, and spared no pains in purifying their system from the older conception. The older ideas and habits of the people yielded, however, very slowly, and it was not until the reforming hand of Justinian had swept away nearly all that remained of the ancient rules of succession, and put a plain and logical system in their place, that the process was completed. The essence of cognation was not mere community of household, but community of blood. As in the earlier system the father represented the agnatic principle, so in the latter the mother represented the cognatic. "The family of the *jus gentium* is the *cognatic* family. . . . The civil law conception of a family was finely displaced by the conception of a family as recognized by the *jus gentium*."⁴

Later
rule of
cognition.

Its essence
community
of blood.

¹ As to who were and were not *agnati*, see Sohm, *Institutes*, pp. 125, 356, 358. *Agnatio* is contrasted with *cognatio*, at pp. 357-358.

² See Ihering's treatment of the *patria potestas* as a non-Aryan institution in his *Vorgeschichte der Indoeuropäer*, pp. 52-54.

³ Females, no matter what their age, remained under guardianship until they had passed by marriage, *in manum mariti*. Gaius (i. 90) says it is not easy to assign any sufficient reason for the perpetual tutory of females. The reason originally was, no doubt, to put it beyond the power of a woman to dispose of her part of the family estate to the prejudice of the *gens*, without its consent.

⁴ Sohm, *Institutes*, pp. 357, 443. The final reform of the law of intestate succession was not accomplished by the *Corpus Juris*, but by the 118th Novel, with its supplement, the 127th Novel.

The practical expedient employed to prevent the inevitable splitting up of the family through the application of the law of agnatic succession was the making of a will,¹ a power which seems to have been unknown to every original society except the Roman. The most ancient was the patrician form of testament — the *testamentum comitiis calatis* — executed in the *comitia curiata*, which were summoned (*calata*) twice a year for this purpose.² Thus the *comitia calata*³ was simply the *comitia curiata* assembled for private business. There is no warrant for saying that a testament thus executed was an act of private legislation and was permitted by the assembled burgesses. The gathering was perhaps merely a form, and the persons assembled may have acted only as witnesses. The second kind of public will was the military testament (*in procinctu*), probably made in the presence of a few comrades on the eve of battle. It is likely that such a formal act could have been performed only in the great gathering of the *exercitus* in the Campus Martius, a gathering which came to be known as the *comitia centuriata*. It is of these that Gaius says: "But originally there were two kinds of testaments, for they were made either before the *calata comitia*, which were held twice yearly for the purpose of making testaments, or they were made *in procinctu*; that is, when, on account of war, men were just going into battle; for an equipped and armed host is called *procinctus*."⁴ More important than either is the ancient plebeian will which seems to have gained at Rome all the popularity the testament submitted to the *comitia calata* appears to have lost. In its earliest form it seems to have been a conveyance *inter vivos*, which was a complete and irrevocable alienation of the testator's family

Two kinds
of patrician
wills.

*Comitia
calata.*

Testament
in procinctu.

The ple-
beian will.

A convey-
ance *inter
vivos.*

¹ "The institution which, next to the contract, has exercised the greatest influence in transforming human society." Maine, *Ancient Law*, p. 188.

² Gell. xv. 27; Ulpian, *Reg.* 20. 2.

³ As to the nature of *comitia calata*, see Mommsen, *Römische Staatsrecht*, iii. 39.

⁴ ii. 101.

Key to its
character-
istics.

Validity
confirmed
by the
Twelve
Tables.

and substance to the guardianship of the one he meant to be his heir. While the strict rules of Roman law may have always permitted such an alienation, it could hardly have had a posthumous effect without the formal assent of the patrician assembly in which the plebeian had no place. If the inability to have his will read in the *comitia calata* once deprived the plebeian of the testamentary privilege, it was removed by that provision of the Twelve Tables which decreed: *Uti legassit super pecunia tutelave suae rei, ita ius esto*.¹ The key to all the characteristics of the plebeian will lies in its descent from the ancient Roman conveyance, *mancipium*, a proceeding from which modern society derived two great institutions, the contract and the will. By the latter the testator, in the presence of five witnesses and the *libripens*, transferred the whole of his patrimony (*familia*), into the custody and guardianship of a person called "the purchaser of the family" (*familiae emptor*). The vendor made a formal announcement of the purport of the sale, and the buyer, as he paid the single copper coin for the patrimony, repeated the same form of words, "Let my custody and guardianship of your patrimony be purchased by this coin to the effect that you may make a legal testament in accordance with public law."² The second stage was reached when the form of instruction (*nuncupatio*) uttered by the vendor was given absolute validity by that clause in the Twelve Tables declaring: *Cum nexum faciet mancipiumque, uti lingua nuncupassit ita ius esto*.³ The last stage in the history of the civil testament is reached when the testator is permitted to present a document to the witnesses of the manucaption with these words: "These waxen tablets contain my will and bequest; I ask you, Quirites, for your testimony."⁴

¹ "A law which can hardly have had any other object than the legalization of the plebeian will." *Ancient Law*, p. 196.

² Gaius, ii. 104.

³ Cf. Sohm, *Institutes*, p. 450; Greenidge, *Roman Public Life*, p. 29.

⁴ Gaius, ii. 104. "Haec ita, ut in his tabulis cerisque scripta sunt, ita do, ita lego, ita testor, itaque vos, Quirites, testimonium mihi perhibetote."

As the system of family law just outlined had its origin in a kind of corporation, which was a religious as well as a natural organism held together by a common worship, it is not strange that law, which everywhere begins with custom, should be found at the outset in close affinity with religion. Many of the customs which form law are bound up with worship, because the relations they regulate depend upon the idea it embodies. The first element to be noted in the Roman composite existing in primitive times, when religion and law were not distinguished, is *fas*¹ — the will of the gods, embodied in rules regulating not only ceremonials but the conduct of all men as such. Thus it was commanded that faith should be kept even with an enemy when a sworn promise had been made to him; thus it was forbidden that war should be undertaken without the prescribed fetial ceremonies; thus murder was punished because it was the taking of a god-given life. When an offense against any of these rules was inexpiable, the offender was excommunicated and outlawed, and, in that way, the precepts of the *fas* approached very closely to laws, because a violation of them was visited with punishments none the less effective because religious rather than secular.² Mommsen describes the *leges regiae* as mostly rules of the *fas*, which were of interest not merely for the pontiffs but for the people, who should know the risks they incurred in violating them.³ Within the wide circle of conceptions thus defined by *fas* were inclosed the set of ideas, probably of narrower range, grouped under the name *jus*, a word of many meanings in Roman law, and one as to whose derivation there is considerable contro-

Relation of
law to
religion.

Precepts
of the *fas*.

*Leges
regiae*.

Jus defined.

¹ Ihering, *Geist*, vol. i. §§ 18, 18 a; Voigt, *XII. Tafeln*, vol. i. §§ 13, 44; Esmarch, *Römische Rechtsgesch.*, 3d ed., 1888, § 11.

² "The notion of crime and its separation from so-called civil injuries, on the one hand, and from sins or purely moral offenses, on the other, has a peculiarly sensitive dependence on the ethical circumstances of a people at any given epoch." Amos, *A Systematic View of the Science of Jurisprudence*, p. 61.

³ *Römische Staatsrecht*, ii. 1. 41. See also Bruns, *Fontes*, pp. 1 ff.; Voigt, *Über die leges regiae* (1876).

versy.¹ If M. Bréal is correct in identifying it with *jōs*, *jaos*, or *jaus* of the Vedas, and the *jaes* of the Zend-Avesta, which he interprets as "the divine will," light is shed upon the interpretation of the words addressed by the presiding magistrate to the assembled *comitia* in asking them whether they assented to the law proposed by him — *Velitis, jubeatis, Quirites*, etc., "Is it your pleasure, Quirites, and do you hold it as divine will, that," and so on. As legislation by the *comitia* of the curies and centuries was regarded as a divine office, Bréal's interpretation finds some support in the maxim, *Vox populi, vox Dei*. If it be a sound one, the only difference between *fas* and *jus* was that the will of the gods, embodied in both, was in the one declared by inspired and in the other by human agency.² But, in the initial stages of society, religion must not be conceived of as the dominant power which gives birth to the law. In the observance of all the established customs and in the performance of all the prescribed ceremonies, that which is pleasing to the gods is not separated, even in thought, from what is beneficial to the community.³ While *jus* might be the result either of traditional and inveterate custom (*jus moribus constitutum*) or of statute (*lex*), it seems to be clear that custom rather than statute was the main factor of the *jus* of the regal period. It is universally admitted that, in the early period, the main body of Roman law was customary, and that at the outset, the customs not only of the different races but those also of the different *gentes* were far from uniform. It is reasonable to believe that, after passing through a gradual process of approximation, they were, in the course of time, consolidated into a general *Jus Quiritium*, the law of the spear-

Difference
between *fas*
and *jus*.

Custom
rather than
statute
main factor
of the *jus*
of regal
period.

Jus
Quiritium.

¹ In later times we have, as opposed to *fas*, the *jus* (Greek *δίκαιον*). Leist, *Altarisches Jus Gentium* (1889), pp. 3, 4. The words *fas* and *jus* are often contrasted by non-legal writers, e.g. Liv. vii. 31; Virg. *Aen.* ii. 157.

² Cf. Muirhead, *Roman Law*, pp. 15–19; Schmidt in Mommsen, *Römisches Staatsrecht*, iii. 310, notes 1, 2.

³ Bryce, *Studies in History and Jurisprudence*, p. 642.

men. The spearmen were the *Quirites*, the members of the gentile houses organized in their curies, primarily for military and secondarily for political purposes. From their ranks the king drew his council of elders; they alone could contract a lawful marriage and make a testament; they alone could consult the gods through the medium of the *auspicia*, and participate in the services offered to the tutelary deities; they alone could take part in the assembly of warriors (*comitia curiata*); in a word, they alone were entitled directly to Rome's peculiar institutions.¹ In the effort to ascertain the primary forms of those institutions the fact must be borne in mind that our knowledge of early Roman customs, at least until after the Twelve Tables, cannot be based upon direct historical evidence. After authentic history begins, inferences can only be drawn as to the structure of the primitive system from traces and survivals. The one part of the statement of Pomponius which can be accepted without reserve is that originally the laws were far from definite.²

Under such conditions it is not reasonable to look for anything like a clear line of demarcation between crimes, offenses, and civil injuries in the regal period. It is difficult to predicate of one offense that it was a sin, of another that it was a crime, and of a third that it was but a civil injury to an individual. If the boundary between civil and criminal jurisdiction existed at all, it was very dimly defined.³ Of the course of justice, whether in civil or criminal matters, before the time of Servius, we know little that is clear or coherent. Originally

Crimes,
offenses,
and civil
injuries.

¹ Cf. Genz, *Das Patricische Rom*, pp. 1 sq., Berlin, 1878; Ihering, *Geist*, vol. i. § 14; Mommsen, *Römische Staatsrecht*, iii. 13 sq.; Carle, *Origini*, pp. 17 sq.

² "In the early years of our city, the people lived for a time without actual statute or any definite law." Pompon. *lib. sing. Enchiridii*, in *Dig.* i. 2, 1-3.

³ Cf. Rein, *Das Criminalrecht der Römer* (Leipzig, 1844), pp. 24 sq.; Clark, *Early Roman Law*, pp. 34 sq.; Abegg, *De antiquissimo Romanorum jure criminali* (Königsberg, 1823), pp. 24 sq.

crimes must have been punished within the family; and, even after the state had established its authority over its members, the house-father, aided by a council in cases of importance, continued to be judge within it, his jurisdiction sometimes excluding that of the state, at others concurring with it.¹

Public
prosecu-
tions.

There seems to have been no machinery for public prosecutions except in the case of treason and murder, first because treason was essentially a state offense, and second because it was soon deemed expedient for the state to repress the blood feud, so apt to disturb public order when friends and neighbors appeared to defend the alleged assassin.² Such criminal jurisdiction as the state did exercise was vested in the king. "The king as judge; sometimes availing himself of the aid of a 'council'; sometimes, perhaps, in cases of minor importance, delegating his judicial powers to individual 'judges'; aided, in his quest of capital crimes, by the *questores parricidii*; appointing at his pleasure, in cases of treason, the extraordinary *duumviri*; allowing, though perhaps not bound to do so, an appeal from the latter to the assembled burgesses, — this is all that we can recognize with any degree of confidence."³

King
as judge.

Vengeance
and
self-help.

As in all archaic systems the rights of vengeance and self-help were deeply rooted. A thief caught in the act at night might be slain, and when caught in the act by day might be sold as a slave. Such self-help was not limited, however, to self-defense in the presence of imminent danger or necessity; it was often employed as an active measure for the redress of wrongs already completed. The words of style used in the sacramen-

¹ See Voigt, *XII. Tafeln*, vol. ii. § 94. And yet we must not forget that "at the earliest period of which we have any knowledge, the community was in existence as well as the family. Of any regular parental judication we must agree with Mommsen that there is not a trace to be found." Clark, *Early Roman Law*, p. 34, citing Mommsen, *History of Rome*, i. 11. 157-158 tr.

² As to murder (*parricidium*) in the early law of Rome, see Osenbrüggen, *Das altrömische Paricidium* (Kiel, 1841), and review by Doltmann in Richter's *Krit. Jahrb.*, vol. xi. (1842), pp. 144 sq.

³ Clark, *Early Roman Law*, p. 87, citing Heineccius *Elementa Juris Civilis*, § 136.

tal real action clearly indicate that there was a time when all questions of quiritarian right, such as disputes concerning property and inheritances, were settled between the contending parties, supported by their clansmen and friends, with the spear as the arbiter.¹ After the firm establishment of the authority of the state, it appears that this procedure by battle² was at a very early day superseded by a submission of such questions of right to the college of pontiffs, of which the king was the official head.³ As their functions were sacred, the pontiffs could only acquire jurisdiction over a purely civil controversy through the engrafting of a sacred element which was added by requiring each of the parties to verify his contention by an oath, whose truth or falsity constituted the ostensible issue. Under that form a finding was made on the real issue, and the party in whose favor it was pronounced was free to make it effectual by self-help, if necessary.⁴ Did Servius Tullius substitute for king and pontiffs a numerous court of citizens to try questions of quiritarian right upon his submission? If he did, was it his intention that the judges should be selected from among the patrician citizens for each case as it arose, or was it a collegiate court or courts that he established, in which the judges had an official character? Dionysius says that Servius drew a line of separation between public and pri-

Spear as
arbiter.

College of
pontiffs.

Servian
reforms.

¹ The praetor commanded the parties to go to the ground *suis utrisque substitibus praesentibus*. Cf. Cicero (*Pro. Mur.* xii. 26). "Sicut dixi, ecce tibi, vindictam imposui." Gaius, iv. 16.

² Trial by battle in English law was continued down to 1819, when it was abolished by statute 59 Geo. III. c. 46. See case of *Ashford v. Thornton* (1818), 1 Bar. and Ald. 405. The case was argued by Mr. Chitty and Sir N. Tindal, and the great authority relied on was Bracton.

³ On early Roman law, see the work of P. Jörs, *Römische Rechtswissenschaft zur Zeit der Republik* (1888).

⁴ As to the nature of the *legis actio sacramento*, see Asverus, *Die legis actio sacramenti*, Leipzig, 1837; Stintzing, *Verhältniss d. l. a. sacramento Verfahren durch sponsio praejudicialis*, Heidelberg, 1853; Huschke, *Die multa u. d. zum sacramentum*, Leipzig, 1874; E. Roth, in the *Z. d. Sav. Stift.*, vol. iii. (1882), R.A., pp. 121 sq.; Fioretti, *Legis actio sacramento*, Naples, 1883; Ihering, "Reich u. Arm im altröm. Civilprozess," in his *Schurz u. Ernst*, pp. 175 sq.; Sohm, *Institutes*, p. 153; Maine, *Ancient Law*, p. 46.

vate judicial processes, and that, while he retained the former in his own hands, he referred the latter to private judges, and regulated the procedure in cases brought before them.¹ Such a substitution for king and pontiffs of a numerous court of citizens to try questions of quiritarian right seems quite in harmony with the general spirit of the reforms of Servius, who, by enormously increasing the number of citizens entitled to that right, multiplied the sources of such future disputes as would have to be determined by such a tribunal or tribunals.² By their judgment not mere matters of personal dispute had to be determined, but a law had to be built up which could be of general and permanent application. There were, however, many cases requiring judicial assistance involving no question of quiritarian right, no general principal of law, simply personal claims, mere disputes or differences as to facts, which could be well decided by a single judge. In order to provide for cases of that character, the *unus judex* was appointed by the king as his commissioner in each case as it arose.³ To that habit of intrusting the judicial office to a private citizen, chosen for each individual case, and acting on a commission from the praetor, instead of to officials trained for the purpose, flowed results which contributed more perhaps than any

Habit of
intrusting
judicial
office to
private
citizen.

¹ Dion. Hal. iv. 25.

² "Thus we should *a priori* arrive at the institution of some other court besides the king's, without the testimony of Dionysius, as a simple matter of necessity. . . . The best modern authorities admit the existence of the *judices* under the king's, whether their institution is to be attributed to Servius or not." Clark, *Early Roman Law*, p. 100, citing Walter (*trad. par Laboulaye*), *Procédure civile chez les Romains*, ch. 1; Ortolan, *Histoire de la Législation Romaine*, §§ 117, 162; Zumpt, *Criminalrecht. Absch.* 1. 4.

³ Wlassak contends that originally in *legis actiones* the trial commonly took place before a *unus judex*, and that the centumviral and decemviral courts did not come into existence until much later than the Twelve Tables, in accordance with the statement of Pomponius. *Röm. Processgesetze*, i. 131 sq. It seems to be clear that in the later Republic the *decemviri stlitibus judicandis* were chiefly engaged in trying actions affecting personal liberty. Sohm, *Institutes*, p. 150, note 2. All sworn judges, including the *decemviri*, stood to the parties solely in the position of private individuals (*judex privatus*), and not in the position of magistrates equipped with compulsory powers. Pernice, *ZS. der Sav. St.* v. 48.

other one cause to make Roman law what it is and has been. Such was the beginning of a system that bore such wondrous fruit, and finally displaced altogether the more imposing centumviral and decemviral courts.¹ Dionysius also credits Servius with the authorship of more than fifty enactments, concerning contracts and crimes² which, he says, were submitted to and approved by the curies. While a few such laws may have been enacted by Servius, either with or without the assistance of the curies, it is probable that the majority of those imputed to him were simply restatements in a dogmatic form of customary laws for the use of the private judges in civil cases, whom he is said to have instituted.

Servian enactments as to contracts and crimes.

4. Having heretofore outlined the political and legal rights of the patrician body, whose members dominated and controlled the early Roman state, the process must be indicated through which the clanless classes, known as plebeians, fought their way from a depressed condition to one of political and legal equality with the patriciate. Putting aside the guesses of the antiquarians as to the original sources from which the clanless classes were drawn,³ it may be said that the plebeians (*plebs*, *plebii*) represented that part of the free community which stood beyond the pale of the *patres*, as the complement of that order. It is generally assumed that at a very early stage in the history of the city all plebeians were in a half-

Plebeians in the regal period.

¹ Pomponius alludes to the court of the *centumviri* and to that of the *decemviri stlitibus judicandis*, and Cicero often refers to centumviral cases and to the centumviral court. While by the time of Gaius (iv. 16) only such matters seem to have been brought before the latter as involved questions of right to an inheritance of the *jus civile*, the spear, the emblem of quiritarian right generally, was still its ensign. Cf. Huschke, *Serv. Tullius*, pp. 585 sq.; C. G. Zumpt, *Über Ursprung. Form, u. Bedeutung d. Centumviralgerichts*, Berlin, 1838; Bachofen, *De Romanorum judicii civilibus*, Göttingen, 1840, pp. 9 sq.; Keller, *Röm. C. P.*, § 6; Karlowa, *Röm. C. P.*, pp. 247 sq.; Kuntze, *Excuse*, pp. 112 sq.; Clark, *Early Roman Law*, pp. 103 sq.; Muirhead, *Roman Law*, pp. 68-75.

² Dion. iv. 13.

³ Freeman's guess is "that the new Roman people, the *plebs*, was made up from the beginning of strictly local tribes; it is certain that, as the state grew, it grew by the addition of fresh local tribes." *Comparative Politics*, p. 70.

Origin of
the plebei-
ate in client-
ship.

servile condition of clientship. "In the old life of the *pagus* and the *gens*, the weaker sought protection of the stronger by a willing vassalage which ripened, when the state was formed, into the plebeiate, which had its origin in clientship. A similar position was ultimately gained by the descendant of the manumitted slave. The stranger (*hostis*) from a city which had no treaty relations with Rome, or no relation which guaranteed a mutual interchange of citizenship, must, if he wandered to this new home, also make application to a patron and become his client."¹ It was the sacred duty of the patron to provide his client with all that was necessary for his sustenance and that of his family;² and as private holdings increased in extent, it was not unusual for the patron or his *gens* to give a client a plot of land for cultivation to be held at pleasure.³ But the naturally organized plebeian family, even when its head became in strict law a *pater familias*, could never become the unit in a group of families capable of forming a *gens* of its own, even when such families bore a common name and were believed to have a common descent. Although such a group might in the course of time become legally independent and freed from all burdens of clientship, it was still disqualified by its original condition of dependence. It remained a mere offshoot (*stirps*); it could never become a self-existent *gens*.⁴

Plebeian
families
incapable
of forming
a *gens*.

¹ Greenidge, *Roman Public Life*, pp. 5-6. As to the reception of the inhabitants of a conquered city, who were violently deported to Rome, into the citizen body as members of the tribe and the *curia*, see Livy (i. 28), who says, "Populum omnem Albanum Romam traducere in animo est, civitatem dare plebi, primores in patres legere"; and Dionysius (ii. 35), who represents the people of Canina and Antemnae as being, after their subjection, enrolled *εἰς φυλὰς καὶ φράτρας*. In prehistoric times it is probable that they became clients immediately of the king, and ultimately, perhaps, of the patrician houses to which they attached themselves as dependents.

² As to the rule of the Twelve Tables, "Patronus si clienti fraudem faxit, sacer esto," attributed by Dionysius to Romulus, see Voigt, *Leges Regiae*, pp. 574 sq.; Mommsen, *Staatsrecht*, iii. 82, n. As to the general condition of the client, see Ihering, *Geist des Röm. Rechts*, i. 237.

³ Savigny, *Recht des Besitzes* (7th ed.), p. 202.

⁴ Greenidge finds the disqualification in the definition of *gentilitas* given by the jurist Scaevola, two of its conditions being free birth in the second degree and the absence of servile blood in one's ultimate ancestry. *Roman Public Life*, p. 10, citing Cic. *Top.* 29.

Even if it be admitted that the plebeians had the right to hold property both movable and immovable, to transfer it by quiritarian modes of conveyance, and to have the protection for it of the tribunals, the fact remains that they had no share in the government of the city, and no right to participate in its religion. While, even before the Servian reforms, the plebeians through the decay of clientage may have become half-fledged citizens, their intermarriage with the gentile houses was out of the question. During the first few centuries *gentes* they had none; a fact which placed them at a disadvantage in the matter of inheritance and guardianship.¹ The aim of the military, financial, and constitutional reforms of Servius Tullius was to hasten the advance toward equality between patricians and plebeians by recognizing the latter for the first time as, in a sense, members of the state. The basis of the primitive military system had been the three tribes, each of which furnished one thousand men to the legion and one hundred to the cavalry.² Servius undertook the formation of a new and enlarged army on a new footing, disregarding both the old clan divisions and the semi-religious, semi-political *curiae*. The new system rested on a distribution of all freeholders (*assidui*) into tribes, classes, and centuries.³ As the new arrangement was to embrace the whole community, and as the plebeians, many of whom had no clans, could not be made members of the three primitive tribes, it was necessary to invent new tribes for their benefit which could include the whole community.⁴ As a recognition of the rights of property was a necessary prelimi-

No intermarriage with gentile houses.

Servian military system.

Four new tribes invented.

¹ On these obscure subjects, see Mommsen, *Staatsrecht*, i. 66 sq., 130 sq.; Block, *Origines du sénat romain*, pp. 255 sq.; Karlowa, *Röm. RG.* i. 62; Cuq, *Int. Jurid.*, pp. 43 sq.

² Varro, *L.L.* v. 89.

³ Cic. *De Rep.* ii. 22; Liv. i. 4; Dion. iv. 16.

⁴ The four were Palatina, Suburana, Exquilina, Collina. Cf. Liv. i. 43. Mommsen holds that "the four tribes are probably nothing more than the three Romulian increased through the *territorium* of the town on the Quirinal." *Staatsrecht*, iii. 125.

nary to the imposition of taxation and the full quota of military service, the tribes marked divisions of the land, and individuals were registered in that tribe in which their land allotment lay.¹ It is probable, however, that the tribes were more than mere divisions of the land; they appear to be divisions of the *populus Romanus*, of which the disinherited or ruined patrician who has lost his land is still a member.² The central idea of the Servian reforms was essentially military, and its methods of registration recognized only those persons who were qualified for service by wealth — wealth was the primary basis of classification. For strategic purposes the new array was divided into classes,³ according to age, the unit of organization being the *centuria*, consisting nominally of one hundred men. The act of registration (*census*) was a solemn religious function conducted by the king, who numbered his fighting force, saw that each warrior was in his proper rank, excluded from these ranks men who were stained with sin, and then concluded the examination with a ceremony of purification (*lustrum*). This system, at first exclusively military in its nature and objects, was subsequently adopted with modifications as the basis of the political system. Despite the fact that the primary purpose of the centuriate organization was the assembly and registration of those liable for military service, it was soon employed as a scheme for the collection of taxes on the registered wealth of the citizens of the classes. Thus a new and mixed assembly sprang into existence, *comitia centuriata*, a

Wealth as a qualification.

The census.

Basis of the political system.

¹ For that reason Servius is said to have prohibited transference of domicile or allotment. Dion. iv. 14.

² "The tribe to which a landless man belonged would depend upon his domicile." Greenidge, *Roman Public Life*, p. 68.

³ For service in the first class the property qualification is given at 100,000 asses (Livy), for the second at 70,000, third 50,000, fourth 25,000, fifth 11,000. A certain acreage of land, as an original qualification, was probably changed afterwards into a given sum of money. Cf. Mommsen, *Römische Tribus*, p. 115.

citizen army, parliament and law court in one, to which a preponderance of political power was inevitably transferred. While the older assembly of the patrician order, *comitia curiata*, was not suddenly stripped of its functions, there was a large number of important public acts which were naturally performed from the first by the assembly of the centuries because especially within its jurisdiction. To this assembly an announcement of a purpose to declare war could most appropriately be made; by the taxpayers here assembled the war tax (*tributum*) could be most conveniently assessed; here the oath of allegiance, probably renewed at every taking of the *census*, was expressed in a *lex centuriata*,¹ and not, as at first, in a *lex curiata*; and here, no doubt, was exercised the appellate power, when the king allowed an appeal in a criminal proceeding, because the regal jurisdiction which the people challenged by the *provocatio* was essentially military jurisdiction. Thus before the end of the regal period a silent yet momentous change was wrought in the structure of the primitive constitution through the transference of the substance of sovereignty from the *comitia curiata*, the assembly of a single order, to the *comitia centuriata*, representing both orders, now blended in the *populus Romanus* in the full sense of that term.

Comitia centuriata and its functions.

5. Beneath the fabulous story of the flight of the kings, as told by the chroniclers whom Livy² followed, it is not hard to perceive the marks at Rome of the widespread wave of change similar to that which in Greece swept away the old heroic monarchies. At Rome, however, the transition was, externally, more sudden and decided. Rome had nothing answering to the archonship for life or ten years; into the place of the king, chosen for life, there at once stepped the two consuls, or

The Republic and the Twelve Tables.

¹ As such in the Republic it was given for the censors. Cic. *De Leg. Agr.* ii. 11, 26.

² Liv. ii. 9-14. Cf. also Plin. (*N.H.* 34. 14) and Tac. (*Ann.* iii. 72). For criticism of the whole story see Schweigler (ii. 60-202) and Zoller (*Latium u. Rom.*, p. 180).

Kingly
office put
into com-
mission.

Kingly
power
survived.

Consuls
and
quaestors.

rather praetors, chosen for a single year. After personal kingship was abolished, the new magistrates simply stepped into the place of the king and kept it; the kingly office was simply put into commission, with nothing taken away from its power, and not much from its dignity.¹ Even the title of king lived on at Rome as the style of one of the priests of the national religion (*rex sacrificus*, *rex sacrificulus*, *rex sacrorum*).² In the conservative commonwealth of Rome, which never wholly abolished any of its ancient institutions, we see how both the kingly and aristocratic elements of the state, in the common acceptance of those terms, might be swept away without at all sweeping away the substance of either the kingly or the aristocratic power. The two new magistrates who were elected by the people assembled in their centuries were armed like the king with the *imperium* and its united powers of military leadership and jurisdiction, and therefore bore the old titles of *praetores* and *judices*.³ While they had the right to nominate their successors, such nominations were subject to ratification by the centuriate assembly to which, by a law passed by P. Valerius (509 B.C.), an appeal was allowed against every sentence of a magistrate pronounced against the life of a Roman citizen.⁴ To the consuls were given two general assistants, the annually appointed quaestors, whose most distinctive duties as representatives of the supreme magistracy were those concerning criminal jurisdiction and finance, probably occupying with respect to criminal procedure much the same place as the *duoviri* in the trial of

¹ It is a mere conjecture that a special right to share in the chief magistracy was for a moment reserved to the house of the fallen king. See Niebuhr, *Römische Geschichte*, i. 544.

² Liv. vi. 41; xl. 42. That his real title was *rex sacrorum* appears from Livy himself (xxvii. 6), from Gellius (xv. 27), and Cicero (*Pro Domo Sua*, 14). *Rex sacrificulus* must have been a survival of a real *rex*.

³ For the title *praetores*, see Cic. *De Leg.* iii. 3, 8; for that of *judices*, Varro, *L.L.* vi. 88.

⁴ "Latae deinde leges . . . ante omnes de provocatione adversus magistratus ad populum." Liv. ii. 8 (509 B.C.). See also Cic. *De Rep.* i. 40, 62.

Horatius.¹ While in the choice of the members of their council of state, the senate, the consuls were legally as unfettered as the king had been,² they were so restrained by custom that the senators were no doubt protected against either capricious removal or selection. The patrician clans had a close hereditary connection with the senate, and the history of the next century and a half represents it as the stronghold of patrician prejudice and influence. And yet during the earlier period of the Republic the power of the magistrates as the representatives of kingship was in the ascendant. In great emergencies they could re-create the single kingship by the appointment of a dictator.³ In 501 B.C., only eight years after the establishment of the Republic and during a war with the Latins, the consuls nominated a chief of state with the royal title and powers.⁴ Under normal conditions the criminal law, which was becoming more and more secularized and removed from the direct control of religion, was monopolized by the official class, as a criminal inquiry could be undertaken solely on the initiative of the consuls who were ostensibly the only guardians of the criminal code. Against this recognized form of patrician power the plebeians renewed their struggle for legal and social equality armed with little more than the restricted voting power they had won in the *comitia centuriata*.⁵ The primary purpose

Senate as stronghold of patrician influence.

Dictatorship and criminal law.

¹ Liv. i. 26. As to the tradition which assigns these officials to the regal period, see Mommsen, *Staatsrecht*, ii. 523 sq. He thinks that while the financial quaestors, as standing officials, originated with the Republic, they had their origin in the criminal *quaestores* of the regal period.

² Festus, p. 246. "Praeteriti senatores quondam in approbio non erant, quod, ut reges sibi legebant sublegebantque, quos in consilio publico haberent, ita post exactos eos consules quoque et tribuni militum consulari potestate conjunctissimos sibi quosque patriciorum et deinde plebeiorum legebant."

³ Mommsen's theory is that the dictator was regarded as a superior colleague of the consuls. His earliest official title was *magister populi*, the technical title in the augural books. Cic. *De Leg.* iii. 3, 9. In deference to republican sentiment he was later called *dictator*. *Staatsrecht*, ii. 145, 153.

⁴ Liv. ii. 18; Pompon. in *Dig.* i. 2, 2, 18.

⁵ It seems to be beyond doubt that at some time during the first three centuries of the Republic plebeians were included in the *comitia curiata*. Mommsen, *Staatsrecht*, iii. 93.

Plebs struggle to limit power of magistrates.

Concession of 495 B.C.

Creation of tribunes.

Concilium plebis curiatim.

of the plebs was to defend themselves by limiting the power of the magistrates in the earliest social struggles which center around the possession of the public land¹ and the law of debtor and creditor. Under that law the borrower was allowed to sell his perpetual services to his creditor conditionally, and upon default the debtor and his whole *familia* passed into the power of his purchaser, and became his bondsman (*nexus*)² until the debt was paid by his labor. It was the application of this hard law of debt that called forth the first resistance from the plebs, who were oppressed not only by constant military duty in the field but by the financial sacrifices such service involved. As early as 495 B.C. a riot was appeased at Rome only by the promise of the Consul Servilius that the *nexi* should be released for service, and that no one should seize goods or pledges from a soldier while he was in the field. When the other Consul Appius renewed almost immediately the enforcement of the law of debt, the plebeian military contingent suddenly gathered in battle array and demanded the appointment of two magistrates, known as tribunes,³ who should have the power of suspending the decree of the consuls when leveled against a member of the plebs. These magistrates, originally two in number, and recognized by a *lex centuriata* passed, perhaps, in the very year of the secession (494 B.C.), must from the first have been elected by an assembly of the plebs known as the *concilium plebis curiatim*.⁴ In dealing with these different assemblies it must never be forgotten that "practically we are treating the Roman community en-

¹ As to early distributions of land amongst plebeians, see Muirhead, *Roman Law*, pp. 39 sq.

² For the abundant literature upon the vexed questions involved in the nexal contract, see Danz, *Gesch. d. r. R.*, vol. iii. § 146; H. Krüger, *Gesch. d. cap. dem.*, pp. 296 sq.; Vainberg, *Le nexum . . . en droit romain*, Paris, 1874.

³ In private law he is a slave; in public law he is free-born Roman citizen, and may be summoned for service in the legions when the state needs his help." Greenidge, p. 24. Varro, *L.L.* v. 81. "Tribuni plebei, quod ex tribunis militum primum tribuni plebei facti, qui plebem defenderent, in secessione Crustumine."

⁴ Cic. ap. Ascon. In *Cornel.*, p. 76.

gaged with the different orders of the day under different formal rules. The people require to be organized in one way for one function, and in another way for another, but under the changing forms there is a unity of personnel which forbids us regarding the different assemblies as different sovereigns. The only disturbance to this unity is found in the fact that the patricians were always excluded from the *concilium* of the plebs."¹ For that reason the patricians maintained that resolutions (*plebiscita*) carried by the tribunes in the *concilium plebis* were not binding on their order. The plebs could only pass rules in their own interests binding on themselves, which gave to their body the character of a guild. When their resolutions went beyond these limits, they were mere petitions to the only recognized legislative power, the consuls, presiding over the *comitia centuriata*. Such they remained down to the year 287 B.C., when these resolutions of the plebs were first raised to the level of laws.² The magistrates of the plebs were given two assistants called aediles, who bore the same relation to them as the two quaestors did to the consuls.³ They served the tribunes in the exercise of their *coercitio*, and after the tribunes had gained criminal jurisdiction, they assisted them as delegates.⁴

Plebs could only bind themselves.

Prior to 287.

Aediles.

Not until 462 B.C. did the plebeian community attempt to advance beyond the system of defensive control over the magistrates of the state by establishing such an equality in the administration of the law as would render this clumsy nega-

Plebs advance beyond defensive control.

¹ Greenidge, *Roman Public Life*, p. 250.

² By the *lex Hortensia* the *concilium plebis* was made one of the legislative organs of the community. The lawyers regard it as the measure which gave decrees of the plebs the full force of law. "Olim patricii dicebant plebi scitis se non teneri, qui asine auctoritate eorum facta essent; sed postea lex Hortensia lata est, qua cautum est, ut plebi scita universum populum tenerent, itaque eo modo legibus exaequala sunt." Gaius, i. 3. See also Pompon. in *Dig.* i. 2, 2, 8.

³ "Tribunos et aediles tum primum per seditionem sibi plebes creavit." Gell. xvii. 21. See also Pompon. in *Dig.* i. 2, 2, 21; Dion. vi. 90.

⁴ Liv. iii. 31. As to the derivation of the word *aediles*, see Mommsen, *Staatsrecht*, ii. 480.

Plebs demand that customary law be reduced to writing.

tive system unnecessary. Prior to the Twelve Tables the private citizen of Rome had no means of ascertaining the law except by asking some sage, who need not answer unless he please, and whose view had no authority except that which his personal reputation implied. A knowledge of the customary law, the mainstay of patrician power, was a mystery guarded by the awful sanctity of the consulate and the pontifical college.¹ In order to remove that disadvantage and to impose limits on the judicial caprice of the consuls, the plebs demanded that that unwritten and elastic system of mysterious rules should be vulgarized by being reduced to a written system accessible to all. In 462 the tribune C. Terentilius Arsa made a proposal to the *concilium* of the plebs that a commission of five should be appointed to clear up the forms of legal procedure,² and in the next year a resolution of the whole college of tribunes was framed for that end. The final outcome of the agitation was the appointment of a commission of three to gather information from the Greek codes, and upon the return of the envoys in 452, after an absence of three years, the demands of the tribunes for the instant prosecution of the work were renewed. The result of the election by the *comitia centuriata* was a commission of ten patricians³ whose duty it was to frame and publish a code of law binding equally on both of the orders. The appointment of this board of ten men with consular power (*decemviri consulari imperio legibus scribendis*), but not subject to the law of appeal,⁴ who were to be the sole and supreme magistrates for a year, was a complete abrogation of the constitution. Within that time the work was done and the code posted up on ten tablets (*tabulae*) and published to the masses.⁵

¹ See below, p. 98 *sq.*

² Liv. iii. 9; Pompon. in *Dig.* i. 2, 2, 4; Mommsen, *Staatsrecht*, ii. 202.

³ Liv. iii. 33; Mommsen, *Staatsrecht*, ii. 714. Plebeians were eligible to membership, but were excluded by patrician influence.

⁴ "Placet creari x viros sine provocatione, et ne quis eo anno alius magistratus esset." Liv. iii. 32.

⁵ Voigt, *XII. Tafeln*, i. 7, notes 2, 3; Krüger, *Geschichte der Quellen*, p. 9, note 9.

The whole body was passed as a *lex* by the *comitia centuriata*, and the people were told that the commission had created equal rights for all.¹ When it was ascertained that the work was not quite complete, a new board of ten, including plebeians, was appointed,² and in that way two new sections were added, bringing up the number of the *tabulae* to twelve, which, after confirmation by the centuries, were published with the rest of the code by the consuls of 448.³

New board
of ten
including
plebeians.

Despite the fact that the rhythmical sentences of the Twelve Tables were committed to memory by schoolboys in Cicero's time,⁴ modern scholars, after the most painstaking research, have only been able to recover fragments of them from the writings of such classical authors as Cicero, Aulus Gellius, Festus, Varro, and the elder Pliny, and from such anti-Justinian jurists as Gaius, Paul, and Ulpian.⁵ And out of these only about forty provisions have been recovered in what profess to be the *ipsissima verba* of the original text. And yet with the aid of such fragments, as now edited, it is possible to understand Tacitus when he says that the first Roman code was the "consummation of equal right."⁶ With a judicious contempt for symmetry and with a genuine Roman respect for the past, the commissioners proceeded to arbitrate between

Fragments
of the
Twelve
Tables.

¹ "Se . . . omnibus, summis infimisque jura aequasse." Liv. iii. 34. The Tables were in existence and seem to have been hung up in the forum as late as the third century of our era. See Mitteis, *Reichsrecht*, p. 138. As to the recent discovery of the Tables of Gortyn, nearly as old in date as the decemviral code, see Roby in *Law Quarterly Review*, vol. ii. p. 136.

² Liv. iii. 35; Dion. x. 58.

³ "Leges . . . in aes incisas in publico proposuerunt." Liv. iii. 57. 10. Pomponius says, "in tabulas eboreas prescriptas." Dig. i. 2, 2, 4.

⁴ "Discebamur enim pueri XII, ut carmen necessarium; quas jam nemo discit." Cic. *De Leg.* ii. 23, 59. Cicero declared that the Tables surpassed the libraries of all the philosophers. *De Orat.* i. 44.

⁵ Cf. Dirksen, *Uebersicht der bisherigen Versuche zur Kritik u. Herstellung d. Zwölf-Tafel-Fragmente* (Leipzig, 1824); Voigt, *XII. Tafeln* (Leipzig, 1883); Zocca-Rosa, *Il commento de Gaio alle legge delle XII. Tavole* (Rome, 1888); Krüger, *Gesch. d. Quellen*, pp. 12-21; Bruns, *Fontes*. (Tübingen, 1879); Schoell, *Legis XII. Tab. reliquiae* (Berlin, 1866); Wordsworth, *Fragments and Specimens of Early Latin* (Oxford, 1874), pp. 253 sq.

⁶ Ann. iii. 27, "finis aequi juris."

Effort to
make the
law equal
for all.

Consti-
tutional
guarantees.

the warring classes by so leveling the law as to make it equal for all. Thus a distinct advance was made in the recognition of plebeian rights. Where a selection had to be made between the customary law prevailing in the patrician or plebeian community, in almost every important particular the latter was preferred. The right of marriage between the orders was, however, denied. Accepting as a guide Livy's declaration that the decemviral code remained the "fountain of all public and private law,"¹ it will be convenient to group its provisions under one or the other of those two heads. Among the constitutional guarantees the most important are those which recognized the sovereignty of the popular assembly by declaring that its last enactment should be final,² and that a fair trial to the citizens should be assured. Cicero says the code granted the *provocatio* "from every kind of court and punishment."³ It was provided that no law or criminal sentence should be directed against a private individual (*privilegia ne inroganto*), and that no capital sentence should be passed except by the assembly of the centuries (*nisi per maximum comitiatum*).⁴ While secret gatherings (*coetus nocturni*) were severely prohibited, the right of free association was granted so as to permit the formation of guilds (*collegia* or *sodalicia*), whose rules made for their own guidance, without special charter, were valid, provided they infringed no public law.⁵ Although as a whole the system embodied in the code is one of *jus* as distinguished from *fas*, there are survivals of the archaic religious penalties alongside of those imposed by

¹ "Decem tabularum leges quae nunc quoque in hoc immenso aliarum super alias acervatarum legum cumulo fons omnis publici privati est juris" (iii. 34).

² Liv. vii. 17, and that too without limiting the sphere of its legislative activity. "In duodecim tabulis legem esse, ut quod cumque posterum populus jussisset, id jus ratumque est."

³ "Ab omni judicio poenaeque provocari licere indicant XII. Tabulae pluribus legibus." *De Rep.* ii. 31, 54.

⁴ *De Leg.* iii. 4, 11.

⁵ As to the Greek origin of that rule in a law of Solon's, see Gaius in *Dig.* 47, 22, 4.

the old principle of self-help. As an illustration of the former it may be said that the man who destroyed standing corn was hanged as an offering to Ceres,¹ and the involuntary homicide could expiate his guilt with the *piaculum* of a ram. As an illustration of the latter, it may be said that a limb was still to be given for a limb,² and for minor wrongs compensation was allowed, twenty-five asses being full reparation for a common assault. Abuse of the freedom of speech was severely punished, death being the penalty for incantations or libels against a citizen.³ The same penalty was imposed for *perduellio* in the form of rousing an enemy against the state or handing over a citizen to the enemy,⁴ and also on the *judex* who had accepted bribes.⁵ The provisions of private law related mainly to the institutions of the family, the fundamental rules of succession, testamentary disposition, and the solemnities of such formal acts as mancipation and *nexum*, judicial procedure, debt, and usury. The marriage recognized was the consensual contract of the plebs strengthened by *usus*.⁶ To that order was given perfect freedom of testamentary disposition, in accordance with the plebeian form of testament *per aes et libram*;⁷ while in intestate inheritance and in guardianship the rights of the *agnati*, common to the plebs, were recognized as prior to those of the *gentiles*, sometimes peculiar to the patricians.⁸ A form of adoption, probably already in use in the plebeian community, was made universal by the recognition of emancipation as a consequence of the threefold sale of

Religious penalties and self-help.

Domain of private law.

¹ Plin. *N.H.* xviii. 3, 12.

² "Si membrum rupit, ni cum eo pacit, talio esto."

³ Cic. *De Rep.* iv. 12.

⁴ Marcian in *Dig.* 48, 4, 3. "Lex duodecim tabularum jubet eum, qui hostem concitaverit quive civem hosti tradiderit, capite punire."

⁵ Gell. xx. 1.

⁶ "But what is more important is the testimony borne by the Twelve Tables to the fact that the foundation of marriage by *usus*, viz. the early notion of the indispensability of *manus* for constituting a valid marriage, has already been abandoned." Sohm, *Institutes*, p. 361.

⁷ See above, p. 64.

⁸ Cf. Greenidge, pp. 10, 106.

a son.¹ The wealthy freedman class was increased by the law that facilitated the emancipation of slaves who had purchased their freedom.² While freedom of contract was guaranteed by the Tables, the harsh law of debt was softened by having the penalty defined and the procedure so carefully described as to offer every loophole of escape to the debtor.³ Ten per cent (*unciarium fenus*) was recognized as the legal rate of interest, and the usurer who exceeded it was punished more harshly than the thief and compelled to restore fourfold.⁴

Mystery as to forms of action continues.

One great abuse remained untouched. The mystery as to the forms of actions was permitted to continue as the special possession of the pontiffs.⁵ The rules of procedure defined in the code for all actions related only to the summons of parties and witnesses and the length of the trial. In the fragments of the Twelve Tables there are to be found but few and slight traces of foreign influence. There is nothing tending to show that the work of the commissioners, who were sent to examine the laws of Athens and other Greek cities in order to collect materials to be used in the codification, was seriously influenced by such examination. While there are provisions in the Tables which bear a remarkable resemblance to laws in force in Greece,⁶ there is no authority for saying they were directly borrowed. The code was thoroughly Roman, both as to substantive and adjective law, and so remained eminently national and un-Hellenic to the end of the Republic.⁷

Code thoroughly Roman.

¹ "Pater si filium ter venum duuit, filius a patre liber esto."

² Ulpian, *Reg.* ii. 4.

³ If, however, the debtor failed to take advantage of all the delays given him, his creditor could put him to death or sell him as a slave beyond the Tiber. Gell. xx. 1.

⁴ Cato, *R.R. prae*f.

⁵ See below, p. 99.

⁶ See Cicero's reference (*De Leg.* ii. 23, § 59) to the regulations about funerals in Table X., and Gaius' references (*lib.* 4, *ad XII, Tab.* in *Dig.* x. 1, 13, and xlvii. 22, 4) to other provisions. See also Hofmann, *Periculum beim Kaufe* (Vienna, 1870), p. 172, and his *Beiträge zur Gesch. d. griech. u. röm. Rechts* (Vienna, 1870), p. 71.

⁷ Cf. Bryce, *Studies in History and Jurisprudence*, p. 755.

Such were the provisions made for the settlement of all important or disputed points in the public and private law of Rome when a knowledge of its substantive elements passed from the special keeping of a privileged oligarchy to the people as a whole. Despite its illustrious source, nothing could be more misleading than the statement that "the most celebrated system of jurisprudence known to the world begins, as it ends, with a code."¹ For centuries before the Twelve Tables Roman customary law had been slowly approaching the critical epoch at which it was to lose its elasticity by being reduced to rigid written forms. Important as that event was, its importance is that which belongs not to a *beginning* but to a turning point. As stated heretofore, the change which thus took place at Rome was simply a part of a wider transition from unwritten customary law to the ancient codes that appeared in Greece, on the Hellenized seaboard of Western Asia, and in Italy, and of which the Twelve Tables are the most famous illustration.² Such codes of laws engraved on tablets and published to the people were substituted for traditional usage reposing in the recollection of privileged oligarchies, not through the refined motives now urged in favor of codification, but rather as a matter of convenience suggested by the discovery of the art of writing, and also by the abuses arising out of the aristocratic monopoly of legal knowledge. The Roman code of the Twelve Tables was but little more than an enunciation in written words of the existing customs of the Roman people put forth at a time when Roman society had barely emerged from that intellectual condition in which civil obligation and religious duty are inevitably confounded. The vitally important result brought about by the transition which thus took

Transition
from un-
written law
to ancient
codes.

Motives for
codification.

Result of
transition.

¹ Maine, *Ancient Law*, p. 1. And yet as Sohm has stated it: "The Twelve Tables mark, at the same time, the starting point in the development of Roman law, so far as it can be historically authenticated." *Institutes*, p. 24.

² See above, p. 49.

The
problem of
problems.

Legal
fictions.

Equity.

place from unwritten customary law to a written code is embodied in the fact that when archaic law is once condensed into a code, there is an end to its spontaneous development, — all after-changes must be effected in it, if at all, deliberately and from without. As law is stable, and societies of the higher type progressive, as social necessities and opinions are ever more or less in advance of law, how is the latter to be kept in harmony with the former? The problem of problems for students of the Historical School is involved in the process through which the strait-jacket, put on an infant state, in the form of a written code, is to be made sufficiently elastic to adapt itself to all the changing conditions of the aftergrowth. As Rome's dominion expanded, as her public life became more complex, as the necessity grew for the extension of the code of a single city to an empire, she solved the problem involved in the adaptation of primitive law to new and wider conditions by the employment of the three agencies known as legal fictions, equity, and legislation. *Fictio*, in old Roman law, is a term of pleading, meaning a false averment upon the part of the plaintiff which the defendant could not deny, and was often employed for the purpose of giving jurisdiction.¹ By its use the domain of Roman law was expanded under the rule which made untraversable the averment that the plaintiff was a Roman citizen when in fact he was a foreigner. A far more potent agent for the adaptation of law to social wants is equity,² a body of extrinsic rules built up alongside of the original civil law, founded on distinct principles and claiming the right either to expand or to supersede it not by virtue of any external authority, but simply by reason of the superior sanctity and wisdom inherent in such principles. By means of the praetorian equity there was built up around the meager

¹ For illustrations and explanations of *actiones ficticiae*, see Sohm, *Institutes*, pp. 181, 249, 250; Maine, *Ancient Law*, pp. 20 sq.

² "There are two, and only two, foundations of law — equity and utility." Burke, *Tract on the Popery Laws*.

body of civil law contained in the Twelve Tables a scientific law literature,—fabricated by juriconsults who professed the most profound respect for the letter of the code,—which reached a considerable volume before the close of the republican period. Not until the establishment of the Empire does the true period of Roman statute law, which was scanty during the Republic, really begin. The enactments of the emperors, issued at first under the guise of popular sanction, and finally by the unaided force of the imperial prerogative, flow on with an increasing volume from the consolidation of the power of Augustus to the completion of the code of Justinian. With the reign of Alexander Severus the power of growth in Roman equity seems to be exhausted;¹ the remaining history of Roman law is the history of the imperial constitutions. Therefore, it may be said that the thousand years of history that lie between the enactment of the Twelve Tables, 448 B.C., and the death of Justinian, 565 A.D., is simply the record of the process through which legal fictions, equity, and legislation expanded and adapted the meager provisions of the decemviral code to the new conditions arising out of a marvelous social, political, and religious development.

Legislation
under the
Empire.

6. Not until eighty-one years after the close of the struggle that culminated in the enactment of the decemviral code was the administration of civil law (*jus civile*) severed from the consulship and intrusted to a separate magistrate, known as the *praetor urbanus*.² That result was the final outcome of a fresh conflict between the orders, after the unfortunate attempt at despotism made by the second board of decemvirs forced their abdication and the reestablishment of consuls created subject to the right of appeal. Under their guidance the

The *praetor urbanus* and the *jus civile*.

¹ Gibbon, *Decline and Fall*, i. 176.

² "Cum consules avocarentur bellis finitimis neque esset, qui in urbe jus redere posset, factum est ut praetor quoque crearetur, qui urbanus appellatus est, quod in urbe jus redderet." Pompon. in *Dig.* 1, 2, 2, 27. See also Liv. vi. 42. "Concessum . . . a plebe nobilitate de praetore uno, qui jus in urbe diceret, ex patribus creando."

*Leges
Valeriae
Horatiae.*

Opening
of the
consulship.

First
plebeian
consul.

assembly passed a series of laws (the *leges Valeriae Horatiae*), one of which guaranteed the perpetuity of the *provocatio* by the enactment that "no one should in future create a magistrate from whom there was no appeal; any one who created such a magistrate should be protected by no law, sacred or profane, and might be slain with impunity."¹ From this time dates the continual struggle for complete social and political equality between the two orders, the plebs demanding that marriage should be permitted between patricians and plebeians.² After that point had been won, the tribunes followed up their victory by pressing their measure for the opening of the consulship. As direct resistance on the part of the patricians was hopeless, they resolved to replace the consulship by the office of military tribune with consular power (*tribunus militum consulari potestate*).³ As military posts below the supreme command had long been open to the plebs, members of that order were eligible as military tribunes whose numbers varied from three to six.⁴ During the period of the military tribunate (444 to 367) the consulship was simply suspended. In 377 the plebs demanded that the military tribunate should be abolished, that the consulship should be restored, and that one of the two consuls must be henceforth of their order.⁵ After ten years of bitter conflict the plebs triumphed; the Licinian rogations became law, and one of their authors, L. Sextius, was created the first plebeian consul. Out of this defeat the patricians plucked a victory by detach-

¹ "Ne quis ullum magistratum sine provocatione crearet, qui creasset, eum jus fasque esset occidi: neve ea caedes capitalis noxae haberetur." Liv. iii. 55.

² "De conubio patrum et plebis C. Canuleius tribunus plebis rogationem promulgavit." Liv. iv. 1. The consuls led the opposition as long as they could, but at last the magistrates were forced to bring the question before the people and then "victi tandem patres, ut de conubio ferretur, consensere." Liv. iv. 6.

³ Liv. iv. 6.

⁴ See Mommsen, *Staatsrecht*, ii. 184. When Livy speaks of eight (v. 1, vi. 27), it is probable that this number included the six tribunes and the two consuls.

⁵ Liv. vi. 35, 42; Appian, *B.C.* i. 8.

ing from the consulship the administration of civil law, which was intrusted to a separate officer, *praetor urbanus*, to be elected by the *comitia* of the centuries with an understanding apparently that he should be a patrician.¹ Thus was accomplished (367 B.C.) a constitutional change of the first magnitude by an addition of a third colleague to the consuls,² who was created "under the same auspices"³ and therefore by the same assembly and under the same formalities of election. The impossibility of the consul's paying adequate attention to judicature had been one of the motives which prompted the establishment of the consular tribunate. Now that difficulty was removed upon the restoration of the consulship by the permanent severance of civil jurisdiction from that office. And yet while the praetor was needed chiefly for the purposes of jurisdiction, he possessed all the other aspects of supreme power which the *imperium* implied, such as the capacity for command in war,⁴ for summoning and transacting business with the senate, and for initiating legislation. It is therefore easy to understand why it was that the praetor — for more than one hundred and twenty years (367–242) the sole civil magistrate of Rome — was primarily a great statesman or politician and not ordinarily a lawyer by profession and training.

A third colleague to the consuls.

Permanent severance of civil jurisdiction.

The supreme judicial power originally vested in the king and then transferred to the consuls was thus finally deposited with the praetor who, if not a juriconsult himself, was a magistrate entirely in the hands of those who were. The law which the *praetor urbanus* administered was the local law of a city, now

Praetor as administrator of jus civile.

¹ For Mommsen's doubts on that subject, see *Staatsrecht*, ii. 204. He doubts it chiefly on the ground that no law is mentioned as opening the office to plebeians thirty years later.

² The praetor was really a third consul who was specially intrusted, not with the military command, but with the administration of justice.

³ "Collegam consulibus atque iisdem auspiciis creatum." Liv. vii. 1. See also Gell. xiii. 15.

⁴ The word *praetor* means literally a general, and is a title of honor accorded to the consuls in the first centuries of the Republic. Mommsen, *Staatsrecht*, ii. 71.

called *jus civile* in the special and narrower sense of the term, the *jus proprium civium Romanorum*. Its administrator was known as the *praetor qui inter cives jus dicit*, or, in the colloquial phrase which became titular, as *praetor urbanus*. The *jus civile* was first codified in the Twelve Tables and its original characteristics were formalism and rigidity. Such was the law which the *praetor urbanus* was called upon to apply to matters in dispute between Roman citizens themselves through legal formulas involving a religious element and for that reason available for Romans only.¹ When a suit was commenced, the litigants appeared before the praetor who made a preliminary examination in order to ascertain the precise points in controversy. After hearing the statements and counterstatements of plaintiff and defendant, he constructed a brief technical outline of the disputed issues, called a formula. That formula was then put into the hands of a *judex* (more like a referee or a jury of one than a modern presiding judge), who, after hearing the evidence of the witnesses and the arguments of the advocates, returned his decisive judgment to the praetor who appointed him. The entire proceeding thus carried on by the praetor, *judex*, and advocates was under the intellectual guidance of the jurisconsults, the makers of the scientific law literature of Rome, who were regarded as law experts, and respected and resorted to as such by all concerned in the administration of justice. Primarily the praetor was a great statesman or politician whose final function was to enforce the law; the *judex*, or as we would now call him, the referee, might have no technical knowledge of law whatever. Under such conditions the unlearned judicial magistrates naturally looked for light and leading to the jurisconsults

Available
for Romans
only.

Judex.

Juris-
consults.

¹ "The personal and religious laws of one community are incapable, in archaic society, of being used by members of another. . . . Many Roman legal formulas involved a religious element, and for that reason, we may be pretty sure, were available for Romans only." Pollock, *Introduction and Notes to Maine's "Ancient Law,"* p. 11.

who instructed them through their *responsa prudentium*, the technical name given to their opinions as experts, which were promptly recorded on tablets by their students or disciples. While the "answers of the learned" varied a good deal at different periods, they always consisted of explanatory glosses on authoritative written documents, and, at first, were exclusively opinions interpretative of the Twelve Tables. The authors of this defining and expanding jurisprudence always professed the most profound respect for the letter of the code, whose full meaning they were ever attempting to bring out by piecing texts together, by introducing principles of interpretation derived from other sources, by adjusting the law to states of fact which actually presented themselves, and by speculating on its possible application to others that might occur thereafter. Thus, of course, were educed a vast amount of canons never dreamed of by the compilers of the Twelve Tables, and which were, in truth, rarely or never to be found therein. At an early period which cannot be precisely fixed it became the custom for the praetor to issue an annual proclamation or edict in which he embodied the system of principles upon which justice would be administered during his official term. As a new system could not be put forth for every year, each succeeding praetor published the edict of his predecessor with such additions as the necessities of the moment or his own views of the law compelled him to introduce. Thus came into being the continuous or unbroken edict,¹ which, as an engine of law reform, was simply a new method of superseding the civil law as much as possible by an edictal jurisprudence fabricated by the praetor out of the principles of the *jus gentium*, finally assumed by the Roman lawyers to be the lost code of nature by which man was gov-

Responsa prudentium.

Principles of interpretation.

The edict.

Its relation to *jus gentium*.

¹ Cf. Lenel, *Beiträge zur Kunde des praetorischen Edicts* (Stuttgart, 1878), and also his *Das Edictum Perpetuum* (Leipzig, 1883); Karlowa, *Römische Rechtsgeschichte*, i., § 60; Wlassak, *Edict und Klageform* (1882).

erned in a primitive state. The edict was the "living voice of the civil law";¹ its function was the interpretation of the law of Rome by "assisting, supplementing, and even correcting the civil law."² It was therefore, in its wider sense, not the *jus civile* of Rome, but its legitimate modifications expressed in what was generally known as magistrates' law (*jus honorarium*). The writers of the Institutes of Justinian give this definition of the honorary law: "The edicts of the praetors are also of great authority. These edicts are called honorary law because the magistrates who bear honors in the state have given them their sanction. The *curule aediles* also upon certain occasions published their edicts which became a part of the *jus honorarium*."³ While a new praetor was not absolutely bound by the edict of his predecessor which he could repeat or alter as he chose, it became the custom for each praetor, on taking office, to repeat a large portion of the edict (the *edictum tralaticium*),⁴ and confine himself merely to additions (*nova edicta, novae clausulae*). By the time of Cicero⁵ the praetorian edict had already become the leading organ for the development of Roman law. When so employing it the praetors showed little taste for the sudden adoption of far-reaching general principles, confining themselves rather, in the first instance, to laying down rules for a perfectly definite case, the conditions of which were clearly understood. As the praetorian edict, like the statutes,

Jus honorarium defined.

The edict as an agent of law reform.

¹ "Nam et ipsum jus honorarium viva vox est juris civilis." Marcian in *Dig.* 1, 1, 8.

² "Jus praetorium est quod praetores introduxerunt adjurandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam." Papinian in *Dig.* 1, 1, 7.

³ II. 2, 7.

⁴ In technical language the edict was *perpetuum* (continuous) *et tralaticium* (transmitted). Ascon. *In Cornel.*, p. 58; Cic. *In Verr.* i. 44, 114.

⁵ He tells that in his later years the Twelve Tables were neglected by the boys in school, who were directed instead to the praetor's edict for their first lessons in law. *De Leg.* i. 5, 17; ii. 23, 59. See also Cic. *De Invent.* ii. 22, 67, in which he says "quo in genere et alia sunt multa, et eorum multo maxima pars, quae praetores edicere consuerunt." Cf. Mommsen, *Römische Staatsrecht*, i. 198, note 3 (2d ed.).

was interpreted according to its letter, its authors preferred to add a second concrete case to the first, a method which had the advantage of securing accuracy of verbal expression. Thus a regular system of judge-made law grew up in the praetorian court, which, in addition to the statutory and customary law already in force, became, in point of fact, one of the most potent factors in the legal system. The edictal code of private law thus constructed united conservatism to a ready capacity for change, thus combining the experience of the past with the life and movement of the present. Although the praetorian law in the form it assumed in the edict was not, strictly speaking, law, we find Cicero declaring that even in his time the edict was felt to be a kind of law (*lex annua*).¹ While the praetorian edict, which reached its climax in the last century of the Republic, may have simply served at first the purpose of giving fuller effect to the *jus civile*, and then of supplanting it, in the end, borne along by the current of the times, boldly assumed the function of reforming it. No matter whether the civil law of Rome was expanded or supplemented directly by the edict of the praetor or indirectly by the responses of the juriconsults, the practical result was the same — the deficiencies of an archaic and unelastic legal system were supplied by judicial exposition, by judge-made law. Such, in general terms, was the process of development through which Roman law passed while being transformed from the local law of the city of Rome to the universal law of the Roman Empire. The history of that process is divided into two great epochs: (1) the period of local law marked by the prevalence of the *jus civile* which was rigid, formal, national; (2) the period of universal law, the period of the Empire, marked by the prevalence of the *jus gentium*, which was equitable, free from formalism, the outcome of the intermingling of Greek and Roman influences.

Its climax
reached in
last century
of Republic.

Law of
a city
becomes
law of
an empire.

¹ "Qui plurimum tribuunt edicto, praetoris edictum legem annuam dicunt esse." (*In Verr.* i. 42, 109.)

The *praetor peregrinus* and the *jus gentium*.

Status of aliens in archaic law; Greek ameliorations.

7. In 242 B.C.,¹ more than one hundred and twenty years after the creation of the *praetor urbanus*, a new praetor was appointed at Rome, known as the *praetor qui inter peregrinos jus decit*, or, in short, as *praetor peregrinus*, whose duty it was to decide cases between foreigners (*peregrini*) and between Roman citizens and foreigners.² As the personal and religious laws of one community were incapable, in archaic society, of being used by members of another; as two strangers living under different laws of their own could not both be judged by either of those laws any more than by Roman, the large body of foreigners drawn to Rome by the rapid expansion of a commercial civilization was necessarily beyond the pale of the *jus civile* which belonged to Romans only. Every alien, *i.e.* non-citizen, was, as such, absolutely barred from the use of any of the formal juristic acts of early Roman law.³ Athens ameliorated similar conditions by allowing her domiciled aliens (*μετοίχολι*) to enjoy her laws through the agency of a patron (*προστάτης*), subject, however, to a stranger's tax, and to military service by land or sea.⁴ The most notable feature of this liberal policy, which also prevailed in other commercial Greek states, was that part of it embodied in international conventions providing for the mutual administration of justice to resident foreigners, for the establishment of mixed tribunals, or even for the grant of isopolity.⁵ Down to about 250 B.C. Rome frequently concluded like international and commercial treaties with other states, members of which

¹ The date is not absolutely certain. Livy (*Epit.* 19) says it was 512; Lydus (*De Magister*, i. 38, 45) says it was 507 u.c., which corresponds to 510 of the Varronian era.

² Pomponius tells us that the new magistrate derived his title from the fact that his principal duty was to administer justice to the increasing peregrin population. *Dig.* i. 2, 28.

³ "*Mancipatio* as well as *nexum* was, on principle, null and void, if one of the parties, nay, if one of the witnesses, were without the Roman *civitas*." Sohm, *Institutes*, p. 39.

⁴ Thuc. III. 16. Cf. Plut. c. 37.

⁵ Arist. *Pol.* iii. 1. 3, 5. 10. The word *ισοπολιτεία* is also used by Plutarch (II. 300) and means "equality of civic rights."

were permitted to engage in commerce in the Roman market. Thus that portion of the Roman law known as the *jus commercii* was granted to such non-citizens (*peregrini*) as possessed the privileges of an international treaty of friendship.¹ But all this changed about the third century B.C. when Rome became too great to condescend, except in quite exceptional cases, to deal with other powers on terms of equality by means of treaties of friendship. After the *jus commercii* was thus withdrawn as a general rule from non-citizens, the doors of the *jus civile* were again closed to the outer world, leaving the bulk of aliens whose business carried them to Rome without legal capacity under the *jus civile*. Out of that condition of things grew the necessity for a law merchant which forced the appointment of a *praetor peregrinus* in 242 B.C. Maine contends that the *jus gentium* was in part originally a market law, and grew out of commercial exigencies.² The attempt has been made heretofore to explain the process through which the *praetor peregrinus*, in his effort to create a law which could be applied to suitors who came into his court, drew from the codes of all the states with which Rome came into commercial contact the basic principles common to them all. An explanation was also made of the process through which a broad principle of Greek philosophy became so blended with a particular branch of Roman commercial law that the Antonine jurisconsults finally assumed the position that the *jus gentium* and the *jus naturale* were identical.³ As an eminent jurist has lately stated it, "the actual *jus gentium* agreed well enough with the rules of natural justice or natural law in the sense of the Greek philosophers, so far as these could be

*Jus
commercii.*

*Jus gentium
as a market
law.*

Became
identical
with *jus
naturale*.

¹ "The *jus commercii* has been read into the relations of Rome with Carthage as depicted in Polybius's second treaty (Polyb. iii. 24. 12). . . . But jurisdiction here may have been the work of some international court, and the *jus commercii*, without the *jus exulandi*, would hardly have made a foreign immigrant a citizen of Rome." Greenidge, *Roman Public Life*, p. 6, note 3.

² Village Communities, pp. 193-194.

³ See above, pp. 33-35.

observed in practice. Accordingly the Roman lawyers, probably working on Greek materials now lost, identified *jus gentium*, for most practical purposes, with *jus naturale*."¹ The law of the nations (*jus gentium*), created by the *praetor peregrinus* with the aid of the juriconsults, became a part of the private law of Rome, which was in substantial accordance with the private law of other nations, more especially with that of the Greeks, which would naturally predominate along the Mediterranean seaboard.² As Voigt has described it, it was "an independent international private law, which, as such, regulated intercourse between peregrins, or between peregrins and citizens, on the basis of their common *libertas*."³ In the edict of the *praetor peregrinus* the *jus gentium*, which was destined not only to shape and determine the legal rights of aliens at Rome but also profoundly to affect the development of the *jus civile*, acquired a written, fixed, and tangible form. The praetorian law was the channel through which the *jus gentium* gained, in the first instance, admittance into Roman civil law, which it rapidly permeated. It was in its nature the equitable law whose growth and expansion, in opposition to the *jus strictum* of ancient tradition, flowed on with an ever increasing volume. And yet its growth did not suddenly sweep away the *jus civile*. As a system of equity it was gradually elaborated alongside of the older and stricter law in a process of development extending over a period of more than five centuries. As the vitality of the forms of the *jus civile* passed away, they were finally discarded and their places taken, bit by bit, by portions of a freer and more equitable law worked out and tested before their final incorporation

Its effect on
jus civile.

¹ Pollock, *Introduction and Notes to Maine's "Ancient Law,"* p. 12.

² And yet it was not quite what the Greeks had called the "common law of mankind," because it could be conceived of as something concrete, resting as it did entirely on the fact that men observed it.

³ *Jus nat.* ii. 661. See his distinctions between *jus civile*, *jus gentium*, and *jus naturale*, as the systems that applied respectively to the citizen, the freeman, and the man. Comp. Cic. *De Orat.* i. 13, 56.

into the organism of Roman law. The praetorian edict was the engine of reform through which the harsh rigors of the *jus civile* were displaced slowly and cautiously by the *jus aequum*, a body of principles minutely elaborated and carefully weighed in all their details. The praetors were not inclined suddenly to adopt far-reaching general principles. They preferred rather, in the first instance, to lay down rules for a perfectly definite case, the conditions of which were clearly understood. The next praetor might then take another step in advance by adding some further clause to the edict of his predecessor. While the praetor had no power to legislate, he might grant or refuse an action, the old action at law (*legis actio*) being confined within certain inflexible formulae which had been developed by the practice of the courts in conformity with the words of the statute. All the magistrate could do was to grant or disallow such an action. Therefore a great relaxation took place when in matters affecting *peregrini* a custom grew up for the praetor to devise formularies of action (*formulae*) which bound the *judex* in his decision. The convenience of this procedure extended its use to almost all cases, and by the *lex Aebutia*, of uncertain date, the simpler formulary procedure almost wholly replaced the more complicated provisions of the *legis actiones*.¹ The formula was a conditioned acquittal or condemnation, a written precept (*formula*) being addressed by the magistrate to the *judex*, containing an authoritative statement of the issue in dispute, together with the principles on which the *judex* was to decide it.²

Legis actiones superseded by simpler procedure.

¹ "Per legem Aebutiam et duas Julias sublatae sunt istae legis actiones; effectumque est ut per concepta verba, id est, per formulas, litigaremus." Gaius, *Institutes*, iv. 30. See also Gell. xvi. 10. 8. The precise date of the *lex Aebutia*, mentioned only twice by ancient writers, is not known. It was probably enacted soon after the establishment of the peregrin praetorship. Cf. Padelletti, *Storia del diritto romano* (Florence, 1878), pp. 251. sq.; Appleton, *Nouv. Rev. Hist.* ix. 489; Voigt, *Römische Rechtsgeschichte*, i., Beil. 6; Girard, *Droit Romano*, pp. 36, 971.

² "The *judex* by his finding changed the conditioned sentence into one that was categorical and final." Greenidge, *Roman Public Life*, p. 205.

Caracalla's
extension
of the
franchise.

This reform, vitally important in itself, is also important as an indication of the wider change that was sure to come. After Caracalla had conferred the Roman franchise on all citizens of the Empire there was but one nationality within it,—the Roman. Thus the Roman nation became coextensive with that portion of mankind upon which civilization of Western antiquity rested, and from the fourth century onward the tendency to shift the center of gravity to the Eastern, in other words to the Greek portion of the Empire, became more and more pronounced. As Sohm has graphically expressed it: "It was no longer the traditions of Rome and Italy, but the views and requirements of Greek provincialism that surrounded and influenced the emperor of Constantinople. The provinces had ousted the old premier country, Greece had triumphed over Rome. And so it came to pass that the *jus gentium* finally displaced the old *jus civile*."¹

Pontifices
and their
responses
prior to
Augustus.

8. From what has now been said it appears that the administration of civil law at Rome rested upon two basic principles: (1) No matter whether the supreme judicial authority was vested in king, consul, or praetor, it was subject to delegation to a private citizen, chosen for each individual case as it arose (and authorized by a commission from the delegating power), instead of to permanent officials trained for the purpose; (2) the person to whom such judicial power was so delegated was expected to act upon advice, given in reference to the facts of the particular case by an expert in the science of law. As law and religion were hopelessly intermingled at the outset, Roman jurisprudence begins with the pontifices who acted as skilled legal advisers in the courts, first of the king, then of the consul, and lastly of the praetor.²

Pontifices
as law
experts.

¹ *Institutes*, pp. 81-82.

² For two hundred years (509-304) the knowledge of the forms of procedure, the *legis actiones*, was open to the patrician pontiffs only. Pompon. in *Dig.* i. 2, 2, 6. Livy (ix. 46. 5) goes so far as to speak of the law as "*in penetralibus pontificum repositum*." According to the historians, law was a

A knowledge of the letter of the law and of its technical application, interpretation, and utilization was originally confined to the college of pontifices and was preserved and handed down by tradition and by instruction of the new members who joined. The early legal opinions (*responsa, decreta*) of the college, which formed the basis of the existing practice, were preserved in the archives of the pontifices, to which none but members of the college had access, and, as a matter of fact, the judges were bound thereby. While the pronouncement of the judgment of the judge followed as a matter of form, the delivery of the pontifical *responsa* virtually decided the suit.¹ The struggle for publicity which culminated in the Twelve Tables and which secured a definition of the rules of procedure for all civil actions, such as the summons of parties and witnesses and the length of the trial, failed to force a revelation of the forms of action; these remained hidden with the pontiffs. We learn from Pomponius² that no sooner was the decemviral code published than the necessity was felt for its interpretation, and for the preparation by skilled hands of forms of action by which its provisions might be made effectual. As these duties fell to the pontiffs the college annually appointed one of its members to be the adviser of private parties (*constituebatur, quis quoque anno praeesset privatis*) and of the *judices* in such matters. The mystery surrounding the occult science of the pontiffs (*interpretatio*) seems to have been first dispelled by Flavius, secretary of Appius Claudius Caecus, who in 304 B.C. divulged a formulary of actions (*legis actiones*) in the shape which the pontiffs had given them;³

Responsa
of the
college as
authority.

Its myster-
ies revealed
by Flavius,
304 B.C.

monopoly of the patricians down at least to the middle of the fifth century of the city. As to the original constitution of the pontifical college, see Clark, *Early Roman Law*, pp. 90, 91, 92.

¹ Cf. Mommsen, *Römisches Staatsrecht*, ii. 46, 48. As to early Roman law, see also P. Jörs, *Römische Rechtswissenschaft zur Zeit der Republik* (1888).

² *Dig.* i. 2, 2, 6. See Bekker, *Aktionen*, i. 68, as to the functions of the pontiffs in settling styles of actions upon the Tables. And also Voigt, *Röm. R.G.* 1, p. 27; Cuq, *Inst. Jurid.*, p. 145 sq.

³ Liv. ix. 46; Gell. vii. 9; Cic. *Pro Mur.* c. 11.

and about 254 B.C. Tiberius Coruncanius, the first plebeian *pontifex maximus*, proclaimed his readiness to give public information on legal questions to all who desired it.¹ Some fifty years later the publication of the *Jus Aelianum* — a collection including the Twelve Tables, the *interpretatio* down to date, and the current styles of action — made a knowledge of law as much the heritage of the laity as of the pontifical college. Here we find the first attempt to set forth the pontifical *jus civile* in a literary form in a work called also the *commentaria tripertita*² by Sextus Aelius Pactus Catus, who was consul 198 B.C. While a technical knowledge of law was thus passing out of the hands of the pontiffs and becoming an element in national culture, the scientific methods of the Stoic philosophy were beginning to operate as an ennobling influence. Under such conditions we find M. Porcius Cato, the younger, who died 152 B.C., making a deliberate attempt to cast the rough materials of law into a systematic form by extracting from the crude legal rules as presented by history the general principles underlying them.³ A half century later Quintus Mucius Scaevola, the younger, *pontifex maximus*, wrote his great work on the *jus civile* which Pomponius says was the first systematic treatise on that subject.⁴ In the eighteen books of this famous and enduring effort the author, departing from the traditional method of merely interpreting the words of statutes or of formulae relating to procedure or juristic acts, arranged, for the first time, the positive private law

Commentaria Tripertita of Aelius.

Cato, the younger, 152 B.C.

Q. Mucius Scaevola, 100 B.C.

¹ Cic. *De Orat.* iii. 33, § 134; Pompon. in *Dig.* i. 2, 1, 2, 35, 38.

² The "cradle of juristic literature" (qui liber veluti cunabula juris continet). Pompon. in *Dig.* i. 2. 38. Cf. Jörs, *Römische Rechtswissenschaft zur Zeit der Republik*, pp. 104 ff.; Voigt, *Ueber das Aelii-und Sabinus-System* (Leipzig, 1875); Cuq, *Inst. Jurid.* (Paris, 1891), p. 474, note 5.

³ Tit. *Dig. de regula Catoniana*, xxxiv. 7. See Roby, *Introduction to the Study of Justinian's Digest*, p. xcv.

⁴ Pompon. *l.c.*, § 41. He was the son of Publius Mucius, the cousin of Quintus Mucius Scaevola, the augur, who in his old age gave Cicero and his friend Atticus their first lessons in law.

of Rome according to the nature of the subjects dealt with, thus laying a permanent foundation for the labors of his successors. Rising above the mere discussion of isolated cases or questions of law, he began the development of legal science by defining in clear and definite terms the nature of such legal institutions as wills, legacies, guardianships, sales, hiring, and the like, and their various genera. Through the definition and employment of general legal conceptions he was the first to lift Roman private law above all the complexities of detail.¹ Thus as the Republican period drew to a close² the responses of the pontifices, by which the development of law had been mainly carried on during the earlier part of it, began to assume a form which must have been fatal to their further expansion. By such treatises as that of Scaevola they were systematized and reduced to compendia. In the writings of Cicero can be traced a growing dislike for the older methods as compared with the more active instruments of legal innovation. By this time the edict, or annual proclamation of the praetor, had gained credit as the principal engine of law reform, while the great group of statutes known as the *Leges Cornelia* had demonstrated what rapid improvements could be effected by direct legislation.³ Such were the influences by which the pontifical responses were undermined prior to the time of Augustus, who dealt the final blow by limiting to a few juriconsults the right of giving binding opinions on cases submitted to them.⁴ Henceforth all *responsa* were to

Responses reduced to compendia.

Right to give them limited by Augustus.

¹ As to Scaevola's work, see Krüger, *G. d. Quellen des Röm. R.*, pp. 59, 60; Burckhardt, *Z.S. der Sav. St.*, ix. 286 ff.

² Servius Sulpicius, a contemporary of Cicero, born about 106 B.C., is said to have been the greatest jurist of the Republican period. See Cic. Brutus, 40-42. (As to his works, see Pompon. *l.c.*, 43, 44.) His pupil was Aulus Ofilius, often called the Tribonian of the Republic, who is supposed to have been consulted by Julius Caesar as to his great but unrealized plan for a codification of Roman law. On that subject, see Sanio, *Rechtshistorische Abhandl. u. Studien* (Königsberg, 1845), pp. 68-126.

³ Cf. Maine, *Ancient Law*, p. 39.

⁴ Pompon. *l.c.*, 47, 48; Gell. xiii. 13. 1; Gaius, i. 7; Just. *Institutes*, i. 2, 8.

be given *ex autoritate ejus (principis)*, or, in other words with the sanction of the emperor himself.¹ Through the emperor as a medium persons who were not pontifices could now deliver authoritative *responsa*, under permission of one who was himself *pontifex maximus*. His successor, Tiberius, issued formal commissions to the same effect.² Thus the power which the pontifical college had for so long a time wielded in the expansion of the *jus civile* definitely passed, together with the science of jurisprudence, into the hands of laymen who, with the *princeps* at their head, were to dominate its further development.³ Within the privileged order of "authorized" jurists, whose attachment to the head of the state brought the imperial power into fresh relief, there seems to have been an inner circle, consisting of the most learned and distinguished of those who had received the imperial authorization, from which the emperor was apparently accustomed to select such great judicial officers as the praetorian prefect, the members of the imperial council, possibly the chief judicial magistrates of the provinces, and in later times the quaestor also. The career of the jurist thus continued to be, though in a somewhat altered form, one of the main avenues to power and distinction.

Juris-
consults of
the Empire
and scien-
tific law
literature.

9. When the members of the new order of lay jurisconsults that gathered around Augustus are viewed not simply as law experts but as juridical statesmen engaged in the actual administration of government, it is easy to understand why it was that they soon divided into the two famous sects or schools

¹ Literally, "under the guarantee of the emperor." Cf. Pernice in the *Juristische Abhandlungen*, "Festgabe für Beseler" (Berlin, 1885), p. 70; Sohm, *Institutes*, § 15; Krüger, *Geschichte der Quellen des Römischen Rechts*, § 15.

² Bryce, *Studies in History and Jurisprudence*, p. 678. See also Bremer, *Rechtslehrer u. Rechtsschulen im röm. Kaiserreich* (Berlin, 1868), pp. 8-15; Machélaud, *Observations sur les responsa prudentium*, Paris, 1871.

³ The *jus respondendi* was the privilege of delivering "opinions" binding on the judge, both on the magistrate and the appointed *judex privatus*. The "opinion" of a privileged jurist was required to be in writing and sealed, and the judge to whom it was submitted in due form was bound to follow it, unless a conflicting opinion of another privileged jurist was also submitted.

whose antagonisms grew, no doubt, out of conflicting political theories. At the head of those who warmly supported the imperial despotism stands Capito, a natural conservative, around whose name clusters little that is definite or tangible. Not enough is known of him as a jurist to enable us to speak with any certainty as to his opinions, as he is rarely referred to in the texts. He has lived on simply as the founder of a school which took its name from his successor, Sabinus, claimed as a native of Verona, the merits of whose works are attested by the fact that commentaries, which form a considerable portion of the Digest, were written upon them by jurists of the first rank. Sabinus, who is said to have earned his living by giving legal instruction,¹ seems to have been the first to organize a school of law. At the head of those who opposed the Sabinians stands Labeo, whose independent spirit gave him a strong leaning toward the older republicanism. His successor, Nerva, the devoted friend of Tiberius and the grandfather of the emperor Nerva, was in turn succeeded by Proculus, who, as the leading disciple of Labeo, gave his name to the school founded by his master. The works of Proculus, or commentaries on them, are frequently cited in the texts. There is foundation for the view that the two opposing schools, generally known as Sabinians and Proculians, were rival teaching halls (*stationes jns publice docentium*),² as we are expressly told that Nerva and Proculus were Labeo's pupils, while Masurius Sabinus, Javolenus Priscus, and Julian are all mentioned as professors as well as practitioners. Certain it is that Labeo, whose extraordinary influ-

Capito and
his school.

Sabinus.

Labeo and
his school.

Proculus.

Rival teach-
ing halls.

Works of
Labeo.

¹ "Huic (Sabino) nec amplae facultates fuerunt, sed plurimum a suis auditoribus sustentatus est." Pompon. in *Dig.* i. 2, 2, 50.

² Gell. xiii. 13. 1. Cf. Bremer, *Rechtslehrer und Rechtsschulen im römischen Kaiserreich*, p. 68; Krüger, *Geschichte der Quellen*, pp. 138, 148; Pernice, *M. Antistius Labeo*, vol. i. (1873), and vol. ii. (1878); Roby, *Introduction*, ch. ix; Karlowa, *Röm. R.G.* i. 662 sq., 677 sq.; Sohm, *Institutes*, § 15; Mascovius, *De Sectis Sabinianor et Proculianor*, Leipzig, 1728; Dirksen, "Ueber die Schulen der Röm. Juristen," in his *Beiträge zur Kunde des Röm. Rechts*, Leipsic, 1825.

ence on the science of jurisprudence is attested by the large number of quotations from his works that survive, was by far the greatest of the two founders. From Pomponius and Aulus Gellius we learn that his broad culture embraced a knowledge of history, dialectics, and philosophy according to the teaching of the Stoics. One of his most celebrated writings is his *Libri πιθανῶν* (*Probabilium*), a theoretical treatise concerning a number of legal principles of universal validity drawn from practical life, which were epitomized and annotated two centuries later by Paulus. In addition to his more practical treatise (*Libri Posteriorum*) on various branches of the *jus civile*, abridged by Javolenus, Labeo was the author of commentaries on the Twelve Tables, the pontifical law, the edicts of urban and peregrine praetors, as well as a collection of responses. He is said to have passed half his year in Rome giving instruction to his disciples and advice to his clients, the other half in the country composing his famous treatises. He was fortunate in appearing in the early days of the Empire when the progress of legal reform was rapidly advanced by the brilliant development of juridical literature, by the authority given by the emperor to certain selected jurists to deliver binding opinions, and by the substitution of the senate for the popular assemblies as the organ of legislation. In his expositions of the law he seems to have been as independent as in his political opinions, criticising freely the doctrine even of those who had been his instructors in jurisprudence. By his various new classifications, divisions, and definitions, he undoubtedly aided in placing both the theory and practice of law on a clearer and firmer footing. He is probably the author of the division of all actions into *actiones in rem* and *actiones in personam*, a division which has affected all juristic thought in matters of private law down to the present time. As an "analogue" his method was to trace all that was normal, all that was united by a common underlying conception, in

Independ-
ence of
his opinions.

Probable
author of
division of
actions.

order that he might in that way bring positive law under the control of the art of dialectics.¹ Thus he was well qualified for the task of boldly grasping and casting into definite shape the many generally recognized principles of law then in a plastic form, which were awaiting some one who could give them, through terse and vigorous expression, precise and authoritative definition. Tradition subsequently traced the opposition between the schools back to the conflicting political theories of their founders, Capito and Labeo, as defined heretofore. While the followers of the former seem to have advocated the progressive development of Roman law in such a way as to free it from the rigors of the older formalism, the followers of the latter were inclined to abide by traditional rules, though, in so doing, they often, perhaps, sacrificed the spirit to the letter of their master's teachings.

His precise and authoritative definitions.

The beginnings, early in the second century, of what is generally known as "classical jurisprudence" — whose mission it was to reconcile the conflict between the two schools through the fusion into one harmonious whole of the *jus civile* and the *jus honorarium* with the new imperial law — are associated with the great names of Celsus, Salvius Julianus, Pomponius, Africanus, Gaius, and Q. Cervidius Scaevola. Celsus, who laid the foundations in his *Digestae* in thirty-nine books, was a follower of Proculus and died probably in the reign of Hadrian. He was succeeded by an eminent jurist of the Sabinian school,² Salvius Julianus, by birth an African, who, under Hadrian and Antoninus Pius, filled the offices of praetor, consul, and *praefectus urbi*, and was for a long time the leading spirit in the imperial council. To him Hadrian intrusted the task of consolidating the edict whereby a code of mingled law and practice which had been slowly growing up was put in a perma-

Mission of "classical jurisprudence."

Celsus.

Salvius Julianus and the perpetual edict.

¹ Cf. Schanz in the *Philologus* (1883), pp. 309 ff. : "Analogisten u. Anomalisten im römischen Recht;" Sohm, *Institutes*, §§ 15, 39.

² Pomponius (in *Dig.* 1. 2, 47-52) tells us that in his time he was the head of that school. Cf. Buhl, *Salvius Julianus*, i. (Heidelb., 1886), 11-134.

ment form. The outcome was confirmed by a decree of the senate which was introduced by a speech from the emperor, who declared that henceforth it should be a standing edict (*edictum perpetuum*), and that new points should be decided by analogy to its provisions.¹ Thus, as Gibbon remarks, "instead of the Twelve Tables the perpetual edict was fixed as the invariable standard of civil jurisprudence."² Julian's greatest undertaking, however, was his *Digesta*, in ninety books, to which he devoted the best part of his life. In that work, dealing with both civil and praetorian law, he extended the arrangement of the praetorian edict, adopted by Celsus, to the exposition of the entire subject, illustrating his doctrines by hypothetical cases while stating the general rule applicable to each with all the force of a convincing aphorism. In the entire list of Roman juriconsults no one perhaps can be found whose dicta are more frequently quoted either by contemporaries or successors. Among those who surrounded Julian, working toward a common end, was Sextus Pomponius, whose best known production is his *Enchiridion*, a long passage from which is preserved in the *Digest*,³ in which the author outlines the external history of Roman law from the foundation of the city to the time of Hadrian. While his voluminous commentary on the edict is not excerpted directly, his readings on Quintus Mucius Scaevola were utilized by the jurists of the Severan period, and drawn on to some extent by the commissioners of Justinian, as were also his writings on Sabinus, and his *Epistulae*, which seem as a general rule to have

His
Digesta.

Sextus
Pomponius.

¹ If any provision was ambiguous, it could only be settled upon appeal by an imperial rescript. The emperors did not begin to interfere in that way to any perceptible extent with the administration of justice until the time of Hadrian. Cf. Karlowa, *Röm. R.G.* i. 630; Krüger, *G. d. Quellen d. Röm. R.*, p. 94; Bremer, in the *Göttinger Gelehrte Anzeigen*, 1889, p. 430.

² *Decline and Fall*, ch. 44.

³ Pompon. *lib. sing. Enchiridiū*, in *Dig.* 1, 2, 2. As to the opinion that it is to some extent corrupt, see Osann, *Pompon. de origine juris frag.*, Giessen, 1848. As to its possible indebtedness to Varro, see Sanio, in his *Varroniana in d. Schriften d. Röm. Juristen*, Leipsic, 1867.

been more complete and critical than was usual in the *responsa* of authorized counsel. Another and perhaps younger friend of Julian's was the rugged and weighty Sextus Caecilius Africanus, who, while acute and exact, was often so obscure as to provoke the comment "*Lex Africani, ergo difficilis.*" His principal works were several books of Questions (*quaestiones*), liberally used by the commissioners of Justinian, and his still more numerous *Epistolae*, more sparingly drawn upon. The fact that the answers to cases stated interrogatively in the Questions are often connected by a verb in the third person has given rise to the conclusion that Africanus expressed therein not his own opinions but those of some other jurist, probably Julian.¹ Of the personal history of Gaius, who flourished as a professor of law under Antoninus Pius and Marcus Aurelius, dying after 180 A.D., we know nothing that is either clear or definite. While some eminent authorities maintain, from the internal evidence of his writings, that he must have been a provincial, and probably an Asiatic,² others claim as decidedly that he lived at Rome.³ Mommsen suggests that he was a law professor at Troas, in the province of Asia, and that he was familiar with the ordinary language of the Greeks as well as with their writings.⁴ Although of such repute in the fifth century as

Sextus
Caecilius
Africanus.

Gaius.

¹ See Krüger, *Gesch. der Quellen*, § 23, note 26.

² E.g. Mommsen, "Gaius ein Provinzialjurist," in *Bekker und Muther's Jahrb.* iii. (1859), 1 sq.; Kuntze, *Der Provinzialjurist Gaius wissenschaftlich abgeschätzt*, Leipzig, 1883.

³ E.g. Huschke, in the *Z. f. R.G.* vii (1868), 161 sq., and in the introduction to the 5th edition of Gaius.

⁴ Cf. Roby (*Introduction to the Study of Justinian's Digest*, etc.), p. 175, who quotes Mommsen. He refers to the fact that his *praenomen* only was used in accordance with Greek custom. The fact that he is not cited as Gaius by any of the classical jurists has been accounted for by the suggestion that he had another name or names by which he was known. Cf. Puchta, *Institutionen*, § 99, note cc.; Huschke's preface to his 5th edition of Gaius. Another suggestion is that he never obtained the *jus respondendi*, and that he never held public office. For that reason Mr. Goudy, in his excellent and popular edition of *Muirhead*, concludes that "Gaius, in short, was, in all probability, as has been frequently said, merely a successful writer and teacher of law either at Rome or in Asia Minor; most probably a native of Asia Minor, who wrote and taught at Rome." Appendix, p. 432.

*Institu-
tionum com-
mentarii
quattuor.*

Niebuhr's
discovery
at Verona,
1816.

to be one of the five jurists put before all others in the Valentinian Law of Citations,¹ it does not appear that the official right to deliver *responsa* was ever conferred on him, despite which fact he enjoyed in the courts of law an authority equal to that of Paulus or Papinian. His famous work was his *Institutionum commentarii quattuor*, whose style has delighted all subsequent ages by a fluency and lucidity worthy of a Greek. It was adopted as a model by all subsequent writers of legal text-books and upon it was founded in the main the Institutes of Justinian.² It is very doubtful whether Gaius was ever a practitioner at all; it was as a teacher and theoretical jurist that he excelled. If it be true that he was lacking in constructive talent, that he did not possess judicial powers of the highest order, it must be admitted that he was a master of style, and that his great compendium of the fundamental doctrines of the law is a model of simplicity, precision, and accuracy of language. If he suffered neglect through the omission of his name from the pages of his contemporaries and successors, he has enjoyed more perhaps than his due share of fame by the happy discovery of his Institutes at Verona in 1816 by the historian Niebuhr, just at the moment when the founders of the historical school of jurisprudence were beginning to assert their influence. As an entire work the Institutes of Gaius had been lost; only an epitome or abridgment had been preserved in the *Lex Romana Visigothorum*.³ After Niebuhr had communicated the results of his investigation to Savigny,⁴ who hazarded the conjecture that his dis-

¹ It ran thus: "We accord our approval to all the writings of Papinian, Paul, Gaius, Ulpian, and Modestine, conceding to Gaius the same authority enjoyed by Paul, Ulpian, and the rest, and sanctioning the citation of all his works." *Theod. Cod.* i. 4. 3.

² A recent contribution to the mass of literature on the subject of Gaius is the treatise of Glasson, *Etude sur Gaius*, etc., 2d ed., Paris, 1885.

³ The last edition is that of Böcking (Bonn, 1831), in the *Corp. jur. Röm. Antejustiniani*. It was first edited apart from the *Lex Romana* in 1525.

⁴ Savigny's account, including Niebuhr's letter to him, is in the *Z. f. gesch. R.W.* iii. (1817), 129 sq.

covery contained the text of the Institutes, the Royal Academy of Berlin, in 1817, commissioned experts to go to Verona and decipher the manuscript, there known as Codex XIII., containing, apparently, the writings of St. Jerome, but in reality a palimpsest. The work was done with genuine German thoroughness and the result is that we have the Institutes of Gaius almost complete. Thus students of to-day were put in possession of the masterpiece of the last Roman jurist in whom the prolonged opposition between the Proculian and Sabinian schools appears. After the time of Pomponius and Africanus the star of the Proculian school began to set. Gaius, who was a Sabinian, still mentions contemporary teachers "of the other school," but their names have not come down to us.¹ In the end the Sabinians triumphed. Through the labors of their great apostle, Julian, the work of fusion was fully accomplished — there was to be henceforth but one system of law, the lines of whose future development were laid down by him.

Final triumph of Sabinians.

As the second century drew to a close the consciousness of the great internal unity to which the Empire had already attained was deepened by the intellectual contributions made by the Greek-speaking Orient to a jurisprudence destined to be coextensive with the franchise finally extended by Rome in the time of Caracalla, to all her subjects. Q. Cervidius Scaevola, who was a Greek by birth, seems to have commenced his career in the reign of Antoninus Pius, to have been in his prime when he sat in the council of state of Marcus Aurelius,² and to have been still engaged in his profession in the early years of Septimius Severus, who was his pupil in the law. To judge from his *Digesta* and *Questiones*, many of his clients seem to have been in the Greek-speaking provinces. His *Digesta*, in forty books, in which he sets forth Roman law after the casuistic method in the shape of *responsa*, adopted,

Greek-speaking Orient.

Q. Cervidius Scaevola.

¹ Sohm, *Institutes*, p. 69.

² It is probable from what Capitolinus says (*Marc.* 11) that he was one of the emperor's praetorian prefects.

Papinian.

Roman
treatises
and English
case law
contrasted.

like others, the arrangement of the edict. It is not devoted exclusively to case law, but contains a considerable amount of doctrinal exposition of such a high order as to have won for its author the title of *prudentissimus jurisconsultorum*.¹ To Scaevola belongs the honor of having been the instructor of the great Papinian, who, like his master, was an Oriental. He was *advocatus fisci* under Marcus Aurelius and became master of requests and afterwards praetorian prefect under Septimius Severus, whom he accompanied to Britain. An enactment in the Code, dated from York in the year 210, is not unreasonably attributed to his pen.² In the works of Papinian, the most important of which consist of eighteen *libri responsorum* and thirty-seven *questionum libri* (the latter following the arrangement of the edict), we have the joint product of Greek and Roman culture, acting and reacting on each other. In these most perfect models of Roman jurisprudence the author adopts the casuistic method of expounding the law by means of answers to concrete legal cases formulated with the elegance of a Greek and the terseness of a Roman. He has no equal in the precision with which he states a case, eliminating all irrelevancies of fact, and bringing out the essential matter in such bold relief in accordance with the legal principle propounded, as to carry conviction by sheer statement without argument. The Roman treatises thus constructed correspond in a general way with the English reports of case law formulated by the judges, who are supposed never to go beyond the concrete facts before them. In theory no dictum thrown out incidentally is of binding force; it is only the *ratio decidendi* that can be quoted as authority. The merit of the English case system rests in the main upon

¹ *Cod. Theod.* iv. 4. 3, 3.

² *Cod.* iii. 32. 1. "Not a few of the great Roman jurists (including Julian, Papinian, and Ulpian) sat in the imperial consistory, and were practically not only judges of the highest court of appeals but also legislators." Bryce, *Studies in History and Jurisprudence*, p. 634.

the concentration of the judicial mind upon the actual questions involved in a real transaction between man and man, which are argued with all the keenness of personal interest, and decided under that sense of responsibility which a judge must feel when he knows that his judgment is not only to determine the pecuniary or social interests of actual litigants, but also that the rules of law announced by him are to stand as a lasting honor or reproach to his memory. In contrast with that system stands the work of the Roman praetor who spoke generally; in the edict which he issued at the beginning of his term he laid down a rule, intended from the first to apply to a large class of instances or cases. After the praetor had thus drawn the outlines of the picture, the scientific jurist followed after him in order to fill in the details by so working over each of his summary statements as to bring out more fully all that it contained, to trace his principles to their consequences, and to illustrate their application. After producing the masterpieces of Papinian, Roman jurisprudence entered upon a period of decline — the creative work of the masters was now to be followed by the labors of the compilers who were, in a critical spirit, to refine the accumulated treasures of the past and to transmit them to posterity. Foremost among the latter class stand Ulpianus and Paulus, who made their first appearance in public life as assessors in the *auditorium* of Papinian¹ and members of the council of Septimius Severus. After being deprived of his dignities by Heliogabalus, Ulpian was reinstated in favor on the accession of Alexander Severus, whose guardian he became, and by whom he was appointed praetorian prefect,² acting virtually as regent. His works, most of which date from the reign of Caracalla (212–217 A.D.),³

Compilers
who
followed
Papinian.

Ulpian.

¹ Papinian was slain in 212, Ulpian in 228. Krüger, *Geschichte der Quellen des römischen Rechts*, pp. 198, 215; Karlowa, *Römische Rechtsgeschichte*, i. 736, 741.

² In a rescript of Alexander, Ulpian is described as *praefectum praetorio et parentum meum*. *Cod. iv. 65. 1, 4*.

³ In the reign of Caracalla, Ulpian and Paul were the heads of two ministerial offices — the records and the requests.

Paul.

consist of his voluminous commentary on the praetorian edict, in eighty-three books, of his fifty-one *libri ad Sabinum*, and of a long series of monographs. Paul, who was probably a pupil of Scaevola, was also a very prolific writer until, as the successor of Ulpian, he became the praetorian prefect of Alexander. His principal works were a commentary in eighty books on the edict, and a commentary in sixteen books on Sabinus. The range of both jurists was much the same, and it was in the main through the medium of their writings that the creative work of the great jurists influenced subsequent ages. The foundations of Justinian's Digest were laid in the critical and comprehensive summaries made by them of the immense intellectual achievements of their predecessors. As Ulpian's writings constitute one third, Paul's writings about one sixth,¹ it follows that about one half of that part of the *Corpus juris* consisting of the Digest owes its origin to their

Modestinus.

works.² After them only one jurist, Modestinus,³ Ulpian's pupil, and like him a native of the Greek portion of the Empire, attained to eminence, emphasized by the fact that he is put by the Valentinian Law of Citations in the same category with Gaius, Papinian, Ulpian, and Paul. Not long after the time of Modestinus, who was praetorian prefect about the middle of the third century of our era, the period of decline set in;⁴ the *jus respondendi* ceased to be conferred after the close of the third century; the emperor alone gave *responsa*

Jus respondendi
no longer
conferred.

¹ Twenty-four hundred and sixty-two passages from Ulpian, 2080 from Paul. "The Sententiae" of Paul, preserved to a considerable extent, together with the Fragments of Ulpian may be found in Tissot's *Trésor*, Metz, 1811. The civilians estimate that there were in all four hundred and thirty-two titles and nine thousand one hundred and forty-two extracts, and that the total of paragraphs and undivided laws is about nineteen thousand. Roby, *Introduction to the Study of Justinian's Digest*, p. 29.

² Paul did not excel as Ulpian did in clearness of diction and exactness of statement, hence the complaint of the glossators, "maledictus Paulus ita obscura loquitur ut vix intelligi potest."

³ There are 344 extracts from his works in the Digest.

⁴ Krüger, *op. cit.*, p. 226; Karlowa, *op. cit.*, i. 752.

in the form of *rescripta principis*.¹ Thus it was that the departing spirit of the creative epoch of Roman law infused itself into the voluminous rescripts of Diocletian and his successors.² It is generally admitted that with the reign of Alexander Severus the power of growth in Roman equity seemed to be exhausted. Then follows a period during which, as Gibbon tells us, "the oracles of jurisprudence were almost mute."³ The Science of Jurisprudence was sharing the fate of art. From that time the history of Roman law is the history of the imperial constitutions and of the attempts finally made to subject the unwieldy body to codification. When at the outset it became necessary to adapt the rigid system of archaic law embodied in the Twelve Tables to the growing wants of an expanding society, the praetorian edict became the channel through which the *jus gentium* flowed into and enriched the primitive system. Thus in a rough and general way the edict was able to work out the principles of a free and equitable law for the mutual dealings of man with man. In solving the finer problem — which involved the discovery of the true nature of the dealings themselves by tracing the unexpressed and unconscious intention underlying them to a moral source — the Roman jurists displayed their highest genius in ascertaining the precise requirements of *bona fides* in human transactions and in applying them to individual cases. Through their labors it was that that shifting and intangible law known as the *jus gentium* was so refined and reduced to exact definitions as to secure to Roman jurisprudence its imperishable power. The classic beauty and perfection of the scientific law literature thus evolved needed now only the finishing touch to be given by the hand of imperial legislation.

End of the
growth of
Roman
equity.

Summary.

¹ And yet instances of grants of the *jus respondendi* seem to have occurred even under Diocletian. Krüger, *Gesch. der Quellen*, p. 260, note 6.

² Cf. F. Hofmann, *Kritische Studien zum römischen Rechte* (1885), pp. 3-35, "Der Verfall der Röm. Rechtswissenschaft." ³ *Decline and Fall*, iv. 543.

Imperial
legislation.

Praetorian
edict as
tentative
legislation.

Private law
improved
by praetor
and jurists.

10. The statement has been made already that formal legislation is the last of the three agencies employed by a progressing state to expand and adapt its archaic code to the ever changing conditions of the aftergrowth. It may be said that, as a general rule, remedial equity is everywhere older than remedial legislation. From the preceding sketch of the working of remedial equity at Rome it appears that the praetorian edict accomplished what may be called tentative legislation when due consideration is given to the method through which it brought about changes in preëxisting law.¹ When an ancient rule was inadequate to new conditions or when it began to be so mischievous as to deserve to become obsolete, the praetor dealt with it in a broad and comprehensive way either by suspending it altogether or by laying down certain marked exceptions to it. When a new kind of action was needed in a particular set of cases, he simply introduced a new sentence into his edict granting it. If, when tested by experience, the innovation was in the judgment of the profession inefficient or ill-advised, the next praetor promptly omitted it,² or so modified it as to meet the objections urged by the jurists against it. Thus while one great branch of modern legislation lay almost untouched during the Roman Republic, that of the regulation of powers and functions of administrative departments, the improvement of ordinary private law was for the most part left to the praetor and the jurists. And yet the fact must not be forgotten that while not very much direct legislation was needed at the outset, there were always competent organs of such legislation in the Roman state from the very beginning. As stated heretofore, the legislative power of the Roman people

¹ See above, p. 92.

² "A particular case decided in a particular way under a provision of the edict which was omitted next year would, of course, not be disturbed, for the Romans held firmly to the principle *stare judicatis*." Bryce, *Studies in History and Jurisprudence*, p. 702, note 1.

was exercised, during the Republic, through three assemblies, those of the curies, the centuries, and the tribes, all primary assemblies consisting of meetings (*comitia*) of the whole body of citizens,¹ just like a Homeric *ἀγορά*, an Athenian *ἐκκλησία*, a Frankish *mallum*, an old English gemot, an Icelandic Thing, a New England town meeting.² These fluctuating Roman assemblies, consisting often of thousands, were bodies composed of minor bodies, each individual voting in the group to which he belonged, *curia*, *centuria*, or *tribus* as the case might be. It was by the majority of curies, centuries, or tribes that the decision of the assembly as a whole was given, the collective voice of each of these groups being reckoned as one vote, and a small group having as much weight as a large one.³ Such assemblies could be convoked and presided over only by a magistrate; no discussion took place in them; they met only to vote on propositions of the presiding magistrate, who alone could speak, and who spoke only to put the question. They voted once only, and that vote was final and supreme, requiring no assent of or confirmation by any other body, but operating directly to create a rule binding all members of the state. In order that it might be understood by the ordinary citizen, the bill proposed was necessarily clear and terse. As it could not be amended by the assembly, the proposing magistrate responsible for it was apt to prepare it with scrupulous care. It became operative immediately on being approved by the single vote of the assembly, with no opportunity of correcting it at any later stage or in any other legislative body. The word *lex*,⁴ or statute, when applied to an enact-

Organs of
legislation.

Methods of
lawmaking.

¹ See above, p. 56.

² Cf. Freeman, *Comparative Politics*, pp. 46, 130, 136, 142, 148.

³ "Each qualified person had a vote in his *curia*, as in some of our political conventions to-day, each member of a delegation might have a vote in that delegation to determine its desires; but the vote of the whole assembly was taken by *curiae*, just as in our conventions the vote of the entire body may be taken by delegations." Howe, *Studies in the Civil Law*, p. 36.

⁴ "*Lex* is probably connected etymologically with the German *legen* (Gothic *lagjan*), as *θεσμός* with *τίθημι*." Greenidge, *Roman Public Life*, p. 43.

Power of
direct
legislation
passed to
senate.

ment by the *comitia* described, in early Latin, not a special kind of legal rule, but merely the expression of the people's will in set terms. When the Roman popular assemblies died out and became obsolete, without being ever formally abolished, the power of direct legislation passed to the senate, a council of elders as old as Rome itself. After the *comitia* ceased to be convoked, except occasionally as a matter of form to give effect to the monarch's will,¹ the legislative functions of the senate naturally won full recognition as they furnished exactly the method of legislation which the emperor desired. And so at the very moment when the senate was recognized as an organ of legislation, it became the mere tool of the emperor for that purpose. Like the *comitia*, the senate could only deal with what the magistrate brought before it, private members having no initiative. But unlike the *comitia*, it could debate a proposition and make amendments thereto; that is to say, it could reject the proposition as drafted and pass one containing different provisions. The senate soon came to be so recognized as the mere instrument through which the emperor enacted and promulgated measures on which he had already decided, that the later lawyers sometimes cite not the *senatus consultum* itself, but the speech (*oratio*)² in which the emperor proposed it to the senate, to whose vote, in these cases, the legal validity of the law seems to have been attributed. After Hadrian's time it would appear that legislative decrees were always passed at the

¹ The *comitia* gradually became a mere name under Augustus and Tiberius. Caius, after professing to restore the assembly to its old powers, withdrew his own gift. For a notable description of the change, see Dion Cassius, lix. 20, who says: ἀπέδωκε μὲν γὰρ τὰς ἀρχαιερείας αὐτοῖς· ἅτε δὲ ἐκείνων τε ἀργότερων ὑπὸ τοῦ πολλῷ χρόνῳ μηδὲν ἐλευθέρως κεχρηματικέναι ἐς τὸ δρᾶν τι τῶν προσηκόντων σφίσι δυνάμεν, καὶ τῶν σπουδαρχιώντων μάλιστα μὲν μὴ πλείονων ἢ ὅσους αἰρεῖσθαι ἔδει ἐπαγγελλόντων, εἰ δὲ ποτε καὶ ὑπὲρ τὸν ἀριθμὸν γένοιτο, διομολογούμενων πρὸς ἀλλήλους, τὸ μὲν σχῆμα τῆς δημοκρατίας ἐσώζετο, ἔργον δ' οὐδὲν αὐτῆς ἐγίγνετο, καὶ διὰ τοῦτο ὑπ' αὐτοῦ αἰθῆς τοῦ Γαίου κατελύθησαν· καὶ τοῦτο τὰ μὲν ἄλλα καθάπερ καὶ ἐπὶ τοῦ Τιβερίου καθίστατο.

² Karlowa, *op. cit.*, p. 643; Krüger, *op. cit.*, p. 83.

instance of the monarch. The final form of direct Roman legislation is that of imperial ordinance, the outcome of the imperial function ascribed in later times to a formal transfer made to the emperor by the people of their own authority.¹

Imperial
ordinances.

It was legislation of that type which gave to the Roman law the shape in which it descended to the modern world, both in the East and West, the number of *leges* and *senatus consulta* being slight in comparison with the surviving body of statute law enacted by the emperor as "opinions" on particular cases (*rescripta*), as decisions of particular cases (*decreta*, *interlocutiones*), as instructions to officials (*mandata*), and as public ordinances or proclamations (*edicta*).² In order to aid the emperor in the discharge of the vast legislative and judicial functions that accumulated around his office, a council was constructed, consisting at first chiefly of senators, afterwards largely of jurists, whose members acted as assessors to the emperor when he heard civil or criminal cases, and who also advised him on projects of legal change. This council, which under Trajan and Hadrian became a regularly organized chamber of formally nominated and salaried officials (presenting in many particulars an interesting parallel to the English privy council), took in the time of Diocletian the name of *consistorium*, the model on which the papal consistory was ultimately built up by the bishop of the imperial city. It cannot be doubted that the duty of prompting, directing, and shaping legislation must have been one of the most important functions of the emperor's legal councilors, who seem to have constituted a sort of ministry of justice, directed by the praetorian prefect, and in later times by the quaestor, with a body

Consisto-
rium and its
functions.

Praetorian
prefect.

¹ Cf. *Just. Inst.* 1. 2. 6; cf. *Dig.* 1, 4, 1.

² In these four ways the emperor influenced the development of law. Cf. Sohm, *Institutes*, pp. 76-80; A. Nissen, *Beiträge zum röm. Staatsrecht* (1885), pp. 209 ff.; Mommsen, *Staatsrecht*, vol. ii., pp. 723 ff. From these authorities may be drawn a fairly clear conception of the emperor as a source of law.

of draftsmen and clerks to aid him.¹ Judging not only from what the Empire must have needed, but from the laws or fragments of laws which remain to us in the codes of Theodosius II. and Justinian, the number of ordinances enacted was enormous. Of the rescripts of Diocletian alone, we possess over a thousand. In the history of Roman statute law is reflected the two stages of development through which the imperial power passed. During the first, while the Roman state remained a republican commonwealth in theory, the power of the emperor was simply the power of the "first citizen"; during the second, *i.e.* from the time of Diocletian and Constantine, it was the power of a monarch. The *princeps* of the first epoch had, in theory, no legislative powers, but the imperial monarch of the fourth and subsequent centuries had legislative powers. From the reign of Diocletian the imperial power, which had then become definitely monarchical, commenced to exercise an exclusive control over the further development of law, the emperor reserving to himself not merely the right formally to create new law 'by direct legislation, but also the right to interpret the existing law, out of which he was thus able in cases of doubt to develop new principles. After imperial legislation had thus superseded senatorial legislation, after an imperial statute became an *oratio* directly promulgated to the nation as a whole, it became necessary, of course, to distinguish the emperor's merely interpretative or judicial from his legislative functions. By the reversal of the earlier rule every rescript and decree, as such, was treated as a *constitutio personalis*, and valued only for the particular case, unless the general validity of the principle applied was expressly ordained. It was only when the emperor chose to act as lawgiver that a law binding on the whole Empire (*constitutio generalis*) came into existence. In later times the general name of constitutions (*constitutio est quod imperator constituit*)

Two stages
of develop-
ment.

Senatorial
legislation
superseded
by imperial.

¹ Bryce, *Studies in History and Jurisprudence*, pp. 725 sq.

was given to all enunciations of the sovereign power of those general rules of law which it desired to have observed by its subjects. The *constitutio generalis* represents the true type of the imperial law. Autocratic power thus exercised through the making of general rules is the most swift and efficient of all instruments for effecting reforms, and, when used with skill and moderation, can confer inestimable benefits. By that means the ancient traditional law (*jus vetus*) was, during an interval of over two centuries (from Diocletian and Constantine to Justinian), subjected to a continuous process of refinement at the hands of successive emperors until perfect unity and harmony prevailed. In the later Empire, dating from the fourth century, there were two groups of sources of law: (1) the old traditional law, *jus vetus*, or *jus* simply, which, although based on the Twelve Tables, the *plebiscita*, the *senatus consulta*, the praetorian edict, and the ordinances of the earlier emperors, really lived on, not in its original forms, but in the juristic literature in which its essence was embodied. The *jus* of the earlier days was swallowed up in the jurist-made law whose development was completed in the classical period; that is to say, during the second and the beginning of the third century. As the authority which the *responsa* and the literature connected therewith had acquired since the opening of the second century was now transferred to juristic literature in general, it was to that source, and not to the original sources, that the tribunals and litigants resorted. After Diocletian the emperor was the only person entitled to give authoritative *responsa*, which he did by means of his rescripts, the *jus respondendi* to individual jurists not being conferred after the close of the third century. Thus the distinction between jurists who had, and jurists who had not, the *jus respondendi* gradually disappeared. In time the writings of those who had never possessed the *jus respondendi* were cited as entitled to an authority equal to that of the

True type of
imperial
law.

Two groups
of sources of
law: (1)
jus vetus;

privileged jurists, provided only that they were supported by equal literary prestige. From the time of Diocletian downward the making of the law was exclusively in the hands of the emperors; the responses of patented jurists were a thing of the past; it was to the imperial consistory alone that the Roman world looked for the interpretation of the old law or the promulgation of the new. That consistory, with the emperor at its head, came to be regarded as a supreme court of appeals, and under the new arrangements of Constantine the judgment of affirmance or reversal was embodied in a rescript addressed to the magistrate from whom the appeal had been taken.¹ While under the rule made by Arcadius and Honorius in 398, such a rescript was not authoritative except for the parties to whom it was addressed, in a renewal of it by Theodosius and Valentinian in 425, it was so qualified as to make it an edict or *lex generalis*, provided it contained any direct indication that the doctrine it laid down was intended to be of general application. In adhering to that qualification, so far as rescripts in the old sense of the word were concerned, Justinian declared that his judgments (*decreta*) should be received everywhere as laws of general application, and that any interpretation given by him of a *lex generalis* should be so regarded, even though decided on the petition of a private party. (2) The later law which sprang from imperial legislation, called sometimes *jus novum*, sometimes *leges*, embraced the various kinds of imperial ordinances heretofore described, which by Justinian's time were sharply distinguished from the old law (*jus vetus*) made up of republican statutes, *senatus consulta*, the edicts of magistrates, and the writings of the jurists. The later Romans contrasted *jus* and *lex* as the English contrast common law and statute. Such were the two kinds of law, *jus* and *leges*, mutually supplementing each

(2) *jus*
novum.

¹ See Puchta, *Inst. d. Röm. Rechts*, i. § 131, as to so-called *consultationes post sententiam*; Muirhead, *Roman Law*, p. 354.

other, which represented the entire development of Roman law that had taken place from the earliest times down to that period in the later Empire when the work of codification began.

11. It seems to be clear that the first cause of the tendency to consolidate the law and make it more accessible is to be found in the profusion with which Diocletian and his successors had used their legislative power, flooding the Empire with a mass of ordinances which few persons could procure or master. Excepting a private collection of rescripts compiled in the second half of the second century,¹ the first collection of imperial rescripts, with a few edicts, made probably at the suggestion of Diocletian, is that contained in the *Codex Gregorianus*, published about 300 A.D., though whether in the East or West critics are unable to determine. From the knowledge of its contents derived in the main from the Breviary of Alaric, and the *Collatio*, the Vatican Fragments, and the *Consultatio*, it is believed to have contained fifteen or sixteen books, subdivided into titles, arranged after the order of the edict. A later collection of rescripts, supplementing the former and published in the course of the fourth century, was the *Codex Hermogenianus*, arranged, so far as appears, only in titles. Although the work of private parties, both codes received statutory recognition from Theodosius and Valentinian in their commission for a preparation of edictal law.² The *jus* (*vetus*) was traditionally taken to include the collections of early imperial ordinances, more especially of rescripts, among

Ante-Justinian codes and collections.

Codex Gregorianus.

Codex Hermogenianus.

¹ They existed in the "*libri xx. constitutionum*" of Papirius Justus, and were considered as belonging to the *jus*, and as such were extracted by Justinian in his Digest (*e.g.* l. 60 D. *de pactis*, 2, 14).

² Cf. Karlowa, *Röm. RG.* i. 940 sq., 959 sq.; Huschke, "Ueber den Gregorianus u. Hermogenianus Codex," in the *Z. f. RG.*, vol. vi. (1867), pp. 283 sq.; Krüger, *Gesch. der Quellen*, § 34; Sohm, *Institutes*, pp. 86, 90, 94. See also the two codes, edited by Krüger, and contained in the 3d vol. of Krüger, M. and S.'s *Collectio lib. Jur.*; Mommsen's article in *Z. d. Sav. Stift.*, 1889, vol. x., pp. 345 sq.

Law of
Citations.

A kind of
codification.

which the Gregorian and Hermogenian codes were preëminent. The next important step in the work of codification is represented by the Law of Citations of Valentinian III., issued from Ravenna in the year 426, and enacting that the writings of Papinian, Paulus, Ulpian, Gaius, and Modestinus, as well as all those cited by these writers, should possess quasi-statutory force so that their opinions should be binding on the judge.¹ When opinions differed on the same question, that should prevail which was supported by most jurists; if the numbers were equal, Papinian's opinions should prevail, or if Papinian had expressed no opinion on the question, the judge was to exercise his discretion. This Law of Citations was evidently based on the assumption that the writings of the five great jurists named were widely circulated and generally known. A kind of codification could, therefore, be accomplished by giving a quasi-statutory force to their writings in preference to other and older jurists, such as Scaevola and Sabinus, whose writings were only to be used, if they — in the words of the enactment — *codicum collatione firmantur*, words whose meaning is doubtful.² A great English jurist has lately said: "I have heard an eminent judge (the late Lord Justice W. M. James) of our own time observe that the easiest way to codify the law of England would be to enact that some eight or ten established text-books, such, for instance, as Jarman on Wills, Chitty on Contracts, Williams on Executors, Lindley on Partnership, Smith's Leading Cases, Hawkins on the Interpretation of Wills, Dicey on Domicil, should have the force of statutes. To do this would add little to the volume of the existing English law, for the text-books mentioned are in reality digested summaries of decisions that lie scattered through the reports."³

¹ *Theod. Cod.* 1. 4. 3.

² Cf. Sohm, *Institutes*, pp. 84, 85 ff., note 1.

³ Bryce, *Studies in History and Jurisprudence*, p. 685.

Despite the various and conflicting explanations¹ of the Valentinian Law of Citations it is hard to doubt that the true one is suggested by the passage quoted above. By recognizing the text-books of five of the greatest and most widely known of the Roman jurists, the constitution of Valentinian simply attempted to accomplish a kind of codification on the lines suggested by Lord James as a hopeful expedient for the codification of English law. Three years after the publication of the Law of Citations, enacted by Valentinian while under the tutorship of Theodosius II., that emperor nominated a commission for the preparation of a body of law which, if the scheme had been executed, would have rendered the work of Justinian unnecessary. Theodosius made it plain that it was not the splendor but the decadence of legal science that ushered in the era of codification when, in explaining some ten years later the motives which actuated his undertaking, he says that he saw with much concern the poverty-stricken condition of jurisprudence, and how very few men there were who, notwithstanding the prizes that awaited them, were able to make themselves familiar with the whole range of law scattered through a multitude of books and large masses of statutes which it was next to impossible for any ordinary mortal to master. After his first scheme, contemplating the compilation of a single code from materials to be derived from the edictal laws since the time of Constantine, from the writings of the jurists, and from the Gregorian and Hermogenian collections of rescripts, failed of execution, he appointed in 435 a new commission to collect the edicts, with nothing, however, in their instructions as to any other matter. The

Decadence
of legal
science
prelude to
codification.

¹ Cf. Karlowa, *Röm. RG.*, i. 933 sq.; Puchta, in the *Rhein. Museum f. Jurisprud.*, vol. v. (1832), pp. 141 sq., and in his *Verm. Schrift.* (Leipzig, 1851), pp. 284 sq.; Roby, *Introduction*, pp. lxxxiv sq.; Sohm, *Institutes*, pp. 84 sq.; Pernice, *Z. der Sav. St.* vii. 155; Danz, *Lehrbuch der G. des Röm. R.* (2d ed.), § 78; Dernburg, *Die Institutionem des Gajus*, p. 110; Ferrini, *Storia delle fonti di diritto Romano* (Melano, 1885), pp. 112 ff. From these authorities may be drawn the different explanations of the Law of Citations.

Code of
Theodosius,
438.

"Post-
Theodosian
Novels."

"Syrio-
Roman
Book of
Law."

work was completed in three years, and the code resulting from it was published at Constantinople early in the year 438, to take effect from the first of January following. A copy was communicated to Valentinian, who ordained that it should take effect in the West from the twelfth of January, 439. In the Theodosian Code were arranged, in sixteen books, subdivided into titles, the *constitutiones generales* issued since Constantine, covering the entire field of law, public and private, civil and criminal, military and ecclesiastical, fiscal and municipal, the private law being embraced in the first five books. All such general constitutions of the same period as had not been adopted were at the same time abrogated. The separate imperial laws issued between the Code of Theodosius and that of Justinian, known as "Novels" (*novellae, constitutiones*), were collected under that name and are called "Post-Theodosian Novels."¹ To the same period belongs the so-called "Syrio-Roman Book of Law," originally written in Greek, and which has survived to this day in a Syrian as well as an Arabic and Armenian translation. It dates from about the year 476, and has been recently edited with notes by Bruns and Sachau, under the title of *Syrisch-Römisches Rechtsbuch aus dem fünften Jahrhundert* (1880).² This work, which sheds no new light except, perhaps, upon the law of sales,³ was, despite its crudity, very extensively used in the East where it was never superseded by Justinian's *Corpus Juris*.⁴ In 1880 was

¹ Krüger, *Quellen*, §§ 36, 37; Karlowa, *Röm. RG.* i. 943, 960 sq.; Sohm, *Institutes*, pp. 86, 90, 94.

² This edition was undertaken at the cost of the Berlin Academy. See Bluntschili's review, in the *Krit. VJS. f. Rechtswissensch.*, N.F., vol. iii. (1880), pp. 548 sq.; also Karlowa, *Röm. RG.* i. 987 sq.

³ Esmein, *Mélanges* (Paris, 1886), pp. 403, 413; Goudy, *Muirhead*, p. 375, note 4. It seems to have been compiled by an ecclesiastic of the church of Syria.

⁴ Dr. L. Mitteis suggests that the opposition, undoubtedly strong, of the Eastern Monophysites to the Orthodox emperors at Constantinople may have contributed to make the Easterns cling the closer to their own customary law. He thinks that the law of the "Syrio-Roman Book," where it departs from pure Roman law as we find it in the *Corpus Juris*, is mainly of Greek origin, though with traces of Eastern custom. See his *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*, pp. 30-33.

published by Dareste, at Paris, a transcript of a bundle of papyrus leaves, discovered by Dr. Bernardakis in the convent on Mount Sinai, containing what have proven to be parts of a commentary on *Ulpianus ad Sabinum*, written after the Theodosian Code, but before that of Justinian, and therefore between 439 and 529.¹

Parts of a commentary on Ulpian.

12. By the end of the fourth century the fabric of social and political life within the provinces of Italy, Gaul, and Spain was more than Roman, — it was fast becoming Christian. The ancient paganism had already broken down before the aggressive force of the Christian church, which, after maturing as an illegal and secret society under ground, finally emerged as a triumphant organization with a well-knit hierarchy. Such organization, inspired by a Semitic faith drawn from a remote corner of the Empire,² had arisen out of the federation of certain religious societies or congregations (*ecclesiae*), whose utmost hope from the state was that in the guise of "benefit and burial societies" they would be shielded from persecution and tolerated in the enjoyment of their communal property.³ Within such societies was developing what was to be a system of constitutional and governmental law, which would endow the overseer (*episcopus*) of every congregation with manifold powers, and alongside of it a system of punitive law, designed to exclude the offender from all participation in religious rites, if not from worldly intercourse with the faithful.⁴ Early in

Christianity and the canon law.

Ecclesiae as "benefit and burial societies."

Systems of interior law.

¹ Cf. Dareste, in the *Nouv. Rev. Hist.*, vol. iv. (1880), pp. 643 sq. These fragments, which throw some light on the law of guardianship, are printed in Huschke's *Jurisprud. Antejust.*, 5th ed., pp. 815 sq., and (edited by Krüger) in the *Collectio lib. Antejust.*, 3d vol., pp. 269 sq.

² "If the Aryan world of Europe has learned its arts and its laws from its own elder brethren, it is from the Semitic stranger that it has learned 'ts faith.'" Freeman, *Comparative Politics*, p. 28.

³ Löning, *Geschichte des deutschen Kirchenrechts*, i. 195 ff.; Sohm, *Kirchenrecht*, p. 75. The former asserts and the latter denies that in the intervals between the outbursts of persecution the Christian communities were legally recognized as *collegia tenuiorum*, capable of holding property.

⁴ Löning, *op. cit.*, i. 264; Hinschius, *System des katholischen Kirchenrechts*, iv. 704; Pollock and Maitland, *History of English Law*, i. 2-4.

the fourth century Christianity became not only a lawful religion, but the only lawful one.

Effect of
state recog-
nition of
Christian-
ity.

The relinquishment of the persecution of the Christians (303) was promptly followed by a recognition of their faith as that which the state favored, and which it before long came to protect and control. So soon as the secular monarch placed his authority at the disposal of the church, the changes that followed began to tell on private law as well as upon institutions. It was not, however, until Christianity had become the established religion of the Empire that we find evidence of changes directly attributable to its influence, changes which stand rather as additions to the moral structure built up within the *Corpus Juris Civilis*, largely through the influence of the Stoic philosophy, than as substitutions for integral parts of that structure. While the church could not attempt to impose her precepts upon the state as binding rules to be substituted for the imposing fabric of Roman law, — whose principles were definitely settled before Christianity aspired to temporal, as well as spiritual, authority, — she was able to supplement that fabric by additions drawn from such precepts. The new influence thus set in motion was felt (1) in the promulgation of new laws made to meet new conditions; (2) in the amending of existing laws to meet the more rigid morality which Christianity inculcated.¹ The spirit of legislation was thus notably changed in relation to such subjects as slavery and the family, including the vital question of marriage and divorce. The rules enacted by the assemblies of the early church for the regulation of its relations with the secular power, its own internal administration, or the conduct of its members were called canons (*κανόνες*, *regulae*), in contradistinction, on the one hand, to its articles of doctrine (*δόγματα*) and, on the other, to the enactments of the civil law-

It supple-
ments Ro-
man law.

Canons
defined.

¹ See "The Influence of Christianity upon the Law of Rome," by the Rev. H. W. Gibson, *Law Magazine and Review*, August, 1906.

giver (*νόμοι, leges*).¹ Thus was made the law regulating certain civil relations which the church claimed the right to deal with because they have a religious side, the law for dealing with spiritual offenses, the law of the church as an organized and property-holding society or group of societies.² Through the growth of the canon law the church extended her influence into all departments of life, and in that way the legislation of the church came to embrace many subjects which properly belonged to the domain of municipal law.

Encroachments upon municipal law.

No sooner was the new faith made lawful than the state was compelled to take part in Christian quarrels and contentions. For a disciplinary jurisdiction over clergy and laity the state conceded a wide area, in which the bishops were permitted to rule.³ As arbitrators in purely secular disputes they became active; under Constantine it is even probable that, for a short time, one litigant might force an unwilling adversary to accept the bishop's tribunal.⁴ Certainly the episcopal jurisdiction was extended by Constantine to all matters which the contending parties agreed to submit to it.⁵ This so-called *Audientia Episcopalis* was confirmed by several later emperors, and the bishop's sentence was enforceable by the civil magistrate. By a law of Justinian, actions brought against the clergy were directed to be brought before the bishop in the first instance. Finally all matters connected in the most distant way with the church or religious duties were deemed

Jurisdiction of episcopal courts.

Its wide extension.

¹ Though first applied only to ordinances of a church assembly, the term "canon" was so extended as to include opinions of the fathers and decretals of the popes.

² It thus appears that the canon law has the church for its source; while ecclesiastical law derives its binding authority solely from the state, and treats of the church as a religious institution.

³ Löning, *op. cit.*, i. 262 ff.; Hinschius, *op. cit.*, iv. 788 ff.

⁴ Löning, *op. cit.*, i. 293; Karlowa, *Römische Rechtsgeschichte*, i. 966. This depends on the genuineness of *Constit. Sirmond.* 1.

⁵ In pursuance of apostolic precept (1 Cor. vi. 1-6), the primitive Christians submitted their disputes to the decision of their bishops, and by several early councils it was enacted that questions between churchmen should be settled by a spiritual tribunal.

Criminal
law.

Appeals to
Roman
curia.

Collectio
Dionysiana.

proper subjects for disposal by her tribunals. As the assistance of the clergy was required on the occasion of baptisms, marriages, and deaths, questions involving legitimacy, marriage, and succession were drawn within the cognizance of the *curiae christianitatis*, which assumed jurisdiction over not only the clergy, but over all who were under the obligation of religious vows, as well as widows and orphans (*personae miserabiles*) and minors. Their activity extended also to the domain of criminal law, punishing, as they did, both ecclesiastical and religious offenses, such as blasphemy, heresy, simony, sacrilege, and such violations of personal and social morality as adultery, bigamy, fraud, and perjury.¹ By the middle of the twelfth century a comprehensive system of appeals had been built up from the bishops' courts to the Pope, — appeals at almost every stage of almost every proceeding; and in that way the whole of Western Europe was drawn within the jurisdiction of one tribunal of last resort, the Roman *curia*. The fourth century is the century of ecclesiastical councils; into the debates of the spiritual parliaments of the Empire² then passed whatever juristic ability and whatever power of organization was left among mankind. About 500 there labored at Rome on the foundations of the *Corpus Juris Canonici* a Scythian monk, who called himself Dionysius Exiguus,³ whose *Collectio Dionysiana*⁴ made its way to the West, where it helped to spread abroad the notion that the popes could contract the sphere of secular jurisdiction by declaring, even if they could not make, law for the church universal. A col-

¹ As to struggles over the demarcation of the true province of ecclesiastical law, see Brunner, *Deutsche Rechtsgeschichte*, § 96; Fournier, *Les officialités au Moyen âge*; Luchaire, *Manuel des institutions françaises*, p. 121; Hinschius, *Kirchenrechts*, v. 373 ff.

² Sohm, *op. cit.*, p. 443.

³ Maassen, *Geschichte der Quellen des canonischen Rechts*, i. 422 ff.; Tardif, *Histoire des sources du droit canonique*, p. 110.

⁴ A version of it (*Dyonysio-Hadriana*) was sent by Pope Hadrian to Charles the Great in 774. Maassen, *op. cit.*, i. 441.

lection of native and foreign canons was in circulation in Spain in the sixth century, and after being added to at various times was generally received toward the close of the next century under the name *Hispana*, from the country of its origin. *Hispana*. It was also known as the *Collectio Isidoriana* by reason of its false attribution to Bishop Isidore of Seville, who died in 636.¹ The *Hispana* circulated among the Franks in a more or less corrupt form, and one edition of it, which appeared about the middle of the ninth century, has become notable in church history as the *Collectio Pseudo-Isidoriana*, or *False Decretals*, compiled no doubt by a single author, a Frankish ecclesiastic, between the years 840 and 860.² While the untrustworthy nature of the book has been irrefragably demonstrated, it is now admitted by Protestant writers that the compilation was produced not in the interest of the Pope but of the bishops, in order, by protecting them from the oppression of temporal princes on the one hand and ecclesiastical councils on the other,³ to correct some abuses prevailing among the Franks. The Pseudo-Isidore continued to be the chief repertory of the canon law until the time of Gratian.⁴ But, before that point is reached, reference must be made to Hildebrand who succeeded in 1073 to the papal throne as Gregory VII., from whose memorable contest with the emperor, Henry IV., dates the commencement of that long series of contests between the papal and imperial power which distracted alike the Holy See *Collectio Pseudo-Isidoriana, or False Decretals.* Beginning of struggle between Pope and emperor.

¹ Maassen, *op. cit.*, i. 667 ff.; Tardif, *op. cit.*, p. 117. Printed in Migne, *Patrol.*, vol. 84.

² The compiler called himself Isidorus Mercator, and he seems to have tried to personate Isidore of Seville.

³ The burden of the contention is that episcopal rights are to be maintained against the *chorepiscopi*, against the metropolitans, and against the secular power. No accusation can be brought against a bishop so long as he is despoiled of his see: *Spoliatus episcopus ante omnia debet restitui*.

⁴ It was everywhere accepted without question until Cardinal Nicholas of Cusa, in the fifteenth century, expressed doubts of the genuineness of some of its contents. During the next hundred years its untrustworthy nature was demonstrated by Erasmus and others.

and the Empire. The leading ideas of Gregory's policy were the complete establishment of the supremacy of the Papacy within the church, and the supremacy of the ecclesiastical over the civil power. In order to make effectual the assertion of the supremacy of the church over the state, Gregory labored to bring about "the establishment of the clergy as a distinct order, animated by one universal corporate spirit, and cut off from those ties of citizenship and kindred which bind men together in earthly bonds."¹ When the conflict grew into overshadowing prominence during the thirteenth and fourteenth centuries, while the disputants admitted that the Papacy and the Empire were both ordained of God, and that each in its own sphere had universal jurisdiction, they failed to agree upon the relations of the two jurisdictions to each other. Whether the supreme temporal ruler, who was admitted to his high office through consecration at the hands of the spiritual chief of Christendom, was in the last resort subordinate to the latter as the lesser to the greater light, or whether their dignities were coördinate and coequal, were questions over which was fought the great battle between Pope and emperor in the days of the world's wonder, Frederick II.²

Clergy as
a distinct
order.

Conflict of
jurisdic-
tions.

Gratian,
founder of
the science
of canon
law.

At a comparatively early stage of that struggle the growth of the canon law was quickened by the organizing hand of Gratian, a monk of Bologna, who is regarded as the founder of the science of canon law by reason of his *Corcordia discordantium canonum*, generally known as the *Decretum Gratiani*, or simply the *Decretum*, published between the years 1139 and 1142.³

¹ Freeman, *Norman Conquest*, iv. 287.

² The contention which Frederick left unconcluded was continued in the next age by two famous disputants. St. Thomas of Aquin, in his treatise *Of the Government of Princes*, defended the supremacy of the Papacy, on the one hand; while Dante, in his treatise *De Monarchia*, maintained the independence of the Empire, on the other. As to the authorship of the *De Regimine Principum*, see *Réformateurs et Publicistes de l'Europe*. Paris, 1864.

³ See Schulte, *Geschichte der Quellen des Canonischen Rechts*, i. 48. A somewhat later date used to be assigned to the work.

Some thirty or forty years before a school of Roman law had been founded at Bologna by Irnerius. The church took up the challenge in the person of Gratian, who was the first to teach as a separate science the canon law, previously regarded as a branch of theology, and as such studied only in the seminaries attached to cathedrals or monasteries. While thus engaged, Gratian undertook to extract the entire subsisting law of the church from the mass of canons, decretals, writings of the fathers, and ecclesiastical historians, and to combine it in one systematic whole. It is impossible not to perceive both the form and spirit of the Digest in that part of his work taken up with the discussion of hypothetical cases (*causae*), in which, after stating the various questions of law (*questiones*) involved, he endeavors to answer them by sorting and weighing the "authorities" that bear upon them. Thus Gratian became the founder of a school of ecclesiastical lawyers well grounded in Roman law, who applied to the *Decretum* and the subsequent decretals the same methods they employed upon Code and Digest. From the twelfth century Bologna University possessed two faculties of law, — a civil and a canon, the members of the latter being called *doctores decretorum*, a title to be won only after six years' previous study. Those who graduated in both faculties were doctors *utriusque juris*. In that way the universities supplied the church with a body of well-trained lawyers capable of advancing the administration of the canon law in the ecclesiastical courts. Gratian had collected in the *Decretum* the papal decretals down to 1139. After that time, owing to the struggles of popes and emperors, and the general extension of ecclesiastical jurisdictions, the outflow of decretals for the whole of Western Christendom greatly increased in volume. Under Alexander III. and Innocent III. it was rapid indeed; the latter (*pater juris*) is said to have published 4000 laws. Such subsequent constitutions went by the name of *decretales extravagantes* (i.e. *extra decre-*

Scope of
his work.

Its method.

Bologna's
two
faculties.

*Decretales
extrava-
gantes.*

tum Gratiani vagantes).¹ All collections of them were superseded, however, by the grand collection published in 1234 by Gregory IX., who commissioned his chaplain, Raymond of Pennaforte, formerly a professor of Bologna, to digest into a code the decretals since the time of Gratian. The laws are in the form of decisions pronounced in cases submitted to the Pope from all parts of Christendom, including several cases from England and Scotland.² Unlike the compilation of Gratian the code of Gregory IX. became "enacted law"; every sentence it contained was law; and all decretals that had not been received into it were thereby repealed. The *Liber Sextus*, published by Boniface VIII. in 1298, was so called because it was put forth as a supplement to Gregory's five books. Another collection of decretals known as *Clementinae* was published in 1313, and, after revision, was promulgated in its present form by his successor, Pope John XXII., in 1317.³ While the *Clementinae* were the last of the collections formally promulgated by the popes, it is generally said that the *Corpus Juris Canonici* was completed in 1500 by the addition of another collection without statutory authority, known as the *Extravagants*, consisting partly of *Extravagantes Johannis XXII.*, partly of *Extravagantes Communes*. And yet as the canon law was intended by its authors to reproduce and rival the imperial jurisprudence, the completion of the mighty fabric should really be marked by the work of Gregory IX., who was the first to consolidate it into a code, and who sought the fame and received the title of the church's Justinian.

Code of
Gregory IX.

*Liber
Sextus.*

Clementinae.

Gregory IX.,
the church's
Justinian.

¹ Of the fifteen known collections five especially, in contrast to that of Gregory IX., are called the *Compilationes Antiquae*, which attained a high reputation in the schools and the courts. The oldest of them, *Compilatio Prima*, is printed in Labbé, *Antiquae Collectiones Decretalium*. Paris, 1609. See also Schulte, *loc. cit.*, i. 84, 85, 88, 187-189.

² For a list of the latter see *Ecclesiae Scoticanæ Statuta*, ii. 232. The original name of Gratian's work was *Libri extra* (sc. *Decretum*), which was abbreviated to X. for convenience in citation, e.g. c. 9, X., *de eo qui cognovit* (iv. 13).

³ The Sext is referred to by "in vi. to" or "in 6"; the Clementines by *Clem.*, and the number of book and title (e.g. c. 1, *de summa trin.* in *Clem.* I. 1).

13. During the fifth century four of the Western provinces of the Roman Empire — Britain, Gaul, Italy, and Spain — were in turn overrun by hordes of Teutonic invaders who came to settle down permanently on the conquered soil. The wandering folks moved in the full order of their nations, reproducing within the appropriated areas their entire scheme of barbaric life — legal, military, political. As stated heretofore, the primary bond which united the people who composed a Teutonic nation was a personal one, — the national king was the first among the people, the embodiment of the national being, but not the king of a particular area or region of territory. The idea of sovereignty was not associated in the Teutonic mind with dominion over a particular portion or subdivision of the earth's surface. Alaric was king of the Goths wherever the Goths happened to be, whether upon the banks of the Tiber, the Tagus, or the Danube. The conception of sovereignty which the Teutons brought with them from the forest and the steppe was distinctly personal or tribal and not territorial.¹ Their conception of law was likewise personal. The *Lex Salica*, for example, was the law of a race, it was not the law of a district. As the Frankish realm expanded, there expanded with it a wonderful "system of personal laws."² Wherever the Swabian might be, he lived under his Alamannic law; or, to state it more vividly, he lived Alamannic law (*legem vivere*). As Bishop Agobard of Lyons has described it, with some exaggeration no doubt, often five men would be walking or sitting together and each of them would own a different law.³ The three continental streams of Teutonic invasion, which flowed over the Latinized and Christianized provinces in question, were unequal both in force and effect.

Teutonic
invasions
and Ro-
mano-Bar-
barian
codes.

Primitive
conception
of sover-
eignty per-
sonal or
tribal.

Like
conception
of law.

Three
streams of
Teutonic
invasion.

¹ See above, p. 19.

² Brunner, *Deutsche Rechtsgeschichte*, i. 259; Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, p. 225; Esmein, *Cours d'histoire du droit français*, p. 57.

³ Agobardi, *Opera*, Migne, *Patrol.*, vol. 104, col. 116: "Nam plerumque contingit ut simul eant aut sedeant quinque homines et nullus eorum communem legem cum altero habeat."

In Gaul the Teuton made the deepest impression, in Italy the least; while in Spain his influence occupies a middle place between the two. Only in the domain of polity and military organization can the Teutonic element claim in the new combination a position of dominant importance. The leading principles which are worked out in the constitutional history of France and Spain are Teutonic; an assertion which may be applied in a modified form to the states of Northern and Southern Italy.¹ In Italy, Gaul, and Spain the older civilization survived. While taking to itself many elements of Teutonic life, it continued to be Roman and Christian, it preserved throughout its identity and continuity. The land was generally divided between the conquerors and the conquered according to certain fixed proportions. The Roman native was permitted to enjoy his own laws, while the conqueror claimed for himself his own barbaric code.² In that way Teutonic life and law settled down by the side of Roman life and law, and a struggle for the mastery was the natural consequence. In the kingdoms founded by the Goths and Burgundians the intruding Teutons were only a small part of a population the bulk of which was Gallo-Roman. It was therefore natural that the Romani should continue to live their own law. As the Salian Franks spread over Gaul, while retaining for themselves their own *Lex Salica*, they conceded to the conquered races the right they claimed for themselves. As their victorious career gave the principle an ever widening scope, it was carried into Italy, and finally into the very city of Rome itself.

Older
civilization
survived.

System of
personal
laws.

Vulgarized
Roman law.

As the natural result of such contact German law became more civilized, while Roman law became sadly barbarized or rather vulgarized. Wherever law was administered among

¹ "The republican history of the North and the feudal system of the South, the municipalities of Lombardy, and the parliaments of Naples are much more German than Roman." Stubbs, *Constitutional History*, i. 7.

² "The Frank was judged by the Salic or Ripuarian code; the Gaul followed that of Theodosius." Hallam, *Middle Ages*, i. 154.

the Romani, it seems to have been in the main a traditional, customary law that paid little heed to written texts; and so, we are told, it was *ein römisches Vulgarrecht* which stood to pure Roman law in the same relation as that in which the vulgar Latin or Romance that the people talked stood to the literary language.¹

The German conception of liberty rested upon the principle that the people were governed by laws which they had a direct share in enacting. The laws of the Franks were enacted *consensu populi et constitutione regis*. But in the course of time the assemblies of those capable of bearing arms appear to have been gradually superseded by a select council, composed of the two orders of the clergy and nobility; and if the body of the people attended their deliberations, it seems to have been more in the capacity of spectators than of actual legislators. Such was the form of the constitution in the time of Charles the Great, in whose name a great proportion of the imperial ordinances known as capitularies were promulgated. In an assembly held at Aachen (802) the lately crowned emperor issued a capitulary² revising the laws of all the races that obeyed him, with a view to harmonizing and correcting them. In his summary of what is now known with regard to the capitularies, Savigny says: "All royal enactments, particularly in later times, were called *capitularia*, or *capitula*."³ The king had a double character,—the one as chief of each individual tribe, and the other as head of the whole nation. Hence the capitularies also are of two classes,—those defining the law of a particular race, *e.g.* '*Capitula addita ad Legem Salicam*,' and those of general application over the whole Frank territory." While a superstructure of capitularies might be

Frankish
legislation.

Capitularies
of Charles
the Great.

Savigny's
summary.

¹ Brunner, *op. cit.*, i. 255.

² Pertz, *Mon. Germ. Hist. Leges*, iii. (legg. I.).

³ See also Brunner, *op. cit.*, i. 374; Schröder, *op. cit.*, p. 247; Esmein, *op. cit.*, p. 116. The capitularies are edited in the *Monumenta Germanica* by Pertz and by Boretius and Krause.

The forged
capitularies.

Transition
from per-
sonal to
territorial
organi-
zation.

An age
in which
no one
legislates.

quickly reared, the *lex* of a folk might not be so easily altered. During the golden age of the Frankish supremacy, which closely centers around the year 800, there was so much definite and formal legislation that in 827 Ansegis, Abbot of St. Wandrille, collected some of the capitularies into four books.¹ In 842 some one who called himself a deacon of the church of Mainz and gave his name as Benedict added three other books containing would-be but forged capitularies,² with the same bent as the decretals concocted by the Pseudo-Isidore, mentioned heretofore. Karolingian capitularies or statutes which enact territorial laws mark an important stage in the general process of transition from personal or tribal to territorial organization. Out of that process, which transformed *Rex Francorum* into *Rex Franciae*, has arisen the state system of modern Europe in which the idea of territorial sovereignty and territorial laws is the basis of all international relations.³

In order to unfold the entire process, it is necessary to bridge the chasm which has been called "the darkest age" or "the diplomatic age," whereby is meant that its law must be hazardously inferred from *diplomata*, from charters, from conveyances, from privileges accorded to particular churches or particular towns. It is an age in which no one legislates. According to the French historians the last capitularies which bear the character of general laws are issued by Carloman II. in 884, and the first legislative *ordonnance* is issued by Louis VII. in 1155.⁴ While much is dark and disputable, the age of the folk laws and the capitularies, "the Frankish time," can be restored. French and German historians are then com-

¹ Brunner, *op. cit.*, i. 382; Schröder, *op. cit.*, p. 251.

² He brought the number of *capitula* to 1697, afterwards increased by supplements to 2100. The history of the later editions will be found in the preface of Baluze to his great collection. Paris, 1677. 2 tom., fol. For an analysis of the contents of the capitularies, see Guizot, *His. de la Civilization*, Lec. XXI. and XXV. See also Michelet, *Origines du Droit Français*.

³ See above, p. 20.

⁴ Esmein, *Cours d'histoire du droit français*, pp. 487-488; Viollet, *Histoire du droit civil français*, p. 152.

pelled rapidly to pass through several centuries to a new point of view, when they take their stand in the thirteenth among law books which have the treatises of Glanvill and Bracton for their English equivalents. The problem of problems is to connect that new order of things with the old, to make the world of "the classic feudalism"¹ grow out of the world of the folk laws, through a process in which the innermost texture of human society was being changed, in which local customs were issuing from and then consuming the old racial laws.²

Growth of
"the classic
feudalism"
out of the
folk laws.

In the light of the foregoing sketch of the Teutonic system of personal laws it will be easier to describe the nature of the Romano-Barbarian codes, the title usually applied to three collections compiled in Western Europe after it had thrown off the sovereignty of Rome. As Roman private law, criminal law, and law of procedure remained in force in the kingdoms founded by the German conquerors within the limits of the Empire, so far as the Roman-born section of the population was concerned, the German kings were prompted by self-interest to anticipate Justinian's work of codification. The first step was taken by Theodoric, king of the Ostrogoths, whose *Edictum Theodorici*,³ dating from about the year 500, embodied a lame attempt to set out in a brief form, with no systematic arrangement, the leading provisions of Roman law in all its branches, public and private, especially criminal law and procedure, the materials being drawn from the writings of the jurists, from the Gregorian, Hermogenian, and Theodosian codes and the later Novels. It is worthy of note that this compilation was intended to apply not only to the Roman

German
kings an-
ticipated
Justinian's
work.

*Edictum
Theodorici.*

¹ "La féodalité classique." M. Flash, *Les origines de l'ancienne France*, ii. 551.

² It "is a task which is being slowly accomplished by skillful hands; but it is difficult, for, though materials are not wanting, they are not of a strictly legal kind; they are not laws, nor law books, nor statements of law." Pollock and Maitland, *History of English Law*, i. 19.

³ The text was first published in 1579 from a manuscript of Pithou's in an appendix to Cassiodorus's *Variarum Libri XII*. See also Rhon, *Comment. ad Edict. Theodorici*, Halle, 1816, the last separate edition.

*Lex
Romana
Burgun-
dionum.*

*Breviarium
Alarici.*

but also to the Gothic subjects of the kingdom,¹ an aspiration which could hardly have been fully realized, certainly so far as Gothic family law was concerned.² The *Lex Romana Burgundionum*, formerly, owing to a mistake of a transcriber, called *Papianus*,³ is a somewhat consecutive and homogeneous compilation which King Gundobald, in publishing in 501 his code of native law (*lex Burgundionum*, or *Gundobada*), had promised should be prepared for the use of his Roman subjects.⁴ Its statutory Roman sources are the same as those of the Breviary, and, owing to certain close resemblances to some of the "interpretations" in that work, many jurists think it must be of later date than 506. It deals with private law, criminal law, and judicial procedure, distributed through forty-seven titles, and arranged very much after the order of the *Gundobada*, from which it has a few extracts. The jurisprudential authorities referred to are Gaius and Paul. Far more ambitious and important than either of the foregoing is the *Lex Romana Visigothorum*, or *Breviarium Alarici*, issued in 506 by the king of the Western Goths, to whom belonged Spain and that part of Gaul which lay south of the Loire, a region whose geographical position had sheltered it to a notable extent from the ravages of the Teutonic invasion. Here, where the genuine spirit of Rome maintained its best energies, Alaric II. compiled, through commissioners appointed with the approval of the bishops and nobles, the famous Breviary⁵

¹ See Brunner, *Deutsche Rechtsgeschichte*, vol. i. (1887), pp. 365 ff.

² Gothic customs must have continued to prevail. Cf. Savigny, *Gesch. d. v. R.* ii. 172 sq.; Stobbe, *Gesch. der deutsch. Rechtsquellen* (Leipzig, 1860-1864), i. 94 sq.

³ Brunner, *loc. cit.*, p. 354.

⁴ The *Lex Romana* applied to the Roman, the record of German tribe law to the German members of the kingdom. To the *Leges Romanæ* were opposed what are now generally known as the *Leges Barbarorum*, including *Lex Salica*, *Lex Burgundionum*, *Visigothorum*, etc. For attempts to reconstruct the genealogy of the various Germanic systems in which the order of date is very different from the order of barbarity, see Ficker, *Untersuchungen zur Erbfolge*, 1891-1895; Ficker, *Ueber nähere Verwandtschaft zwischen gothisch-spanischem und norwegisch-isländischem Recht* (Mittheilungen des Instituts für österreichische Geschichtsforschung, 1888, ii. 456 ff.).

⁵ It was first styled *Breviarium* by the writers of the sixteenth century, and

which stood forth for so long a time as the *Lex Romana* of Western Europe. In its composition its authors adopted a system similar to that subsequently employed by Justinian. Instead of attempting to expound Roman law upon a plan of their own, they wisely preferred to preserve its classic form as well as its substance by collecting excerpts from its traditional and statutory sources. For the *leges* they utilized some 400 of the 3400 enactments of the Theodosian Code, and about 30 of the known 104 post-Theodosian Novels; for the *jus* the Institutes of Gaius in an abridged form (the so-called "Gothic Epitome of Gaius"), Paul's Sentences, portions of the *Codex Gregorianus* and *Hermogenianus*, concluding it all with a single sentence from the first book of Papinian's Responses.¹ Leaving, as a general rule, the selected passages unaltered, the compilers, excepting only the work of Gaius adopted in an abbreviated form, annexed to them an *interpretatio* regulating in a judicious way the application of Roman law in the kingdom of the Visigoths,² such "interpretation" resembling that of the Twelve Tables in that it is often not so much explanatory of the text as qualificative or corrective of it. To the method of its composition, through which the best portions of the imperial law were preserved in their integrity, must be attributed the fact that while the lame and imperfect epitomes contained in the codes of the Ostrogoths and Burgundians lost all practical importance with the destruction of those kingdoms, the *Breviarum* lived on and exercised a dominating influence upon Romanic law in Southern France and some parts of South Germany down to the eleventh century.³

*Lex
Romana of
Western
Europe.*

Best
portions of
imperial law
preserved.

was first published in full by Srichard (Basle, 1528). The authoritative edition is that of Haenel, *Lex Rom. Visigothorum ad LXXVI. libror. manuscriptor. fidem recognovit* . . . Gust. Haenel, Berlin, 1849. See Krüger, *Quellen*, § 40.

¹ Brunner, *loc. cit.*, pp. 356, 357; Karlowa, *Röm. Rechts*, i. 976.

² Cf. Fitting, *ZS. für RG.*, vol. ii. (1873), pp. 222 ff.

³ Until the rise of the Bologna school in the twelfth, it was from it rather than from the works of Justinian that Western Europe derived its scanty knowledge of Roman law. Haenel, *Prolegomena*; Stobbe, i. 65 sq.; Karlowa, *Röm. RG.* i. 976 sq.; Savigny, *Gesch. d. r. R.* ii. 37 sq.

Work of the
glossators.

From the sixth century onward a rivalry existed between this *Corpus Juris* of Alaric and the *Corpus Juris* of Justinian, the one predominating in the East, the other in the West, — a rivalry never terminated until the school of glossators, who revived in the twelfth century the study of Roman law in Italy where the *Corpus Juris* of Justinian was in force, took it as the starting point of the triumphant movement that extended Italian jurisprudence to the West. Thus, as Sohm has graphically expressed it, “the *Corpus Juris* of the German King was destroyed by the *Corpus Juris* of the emperor of Byzantium.”¹

*Corpus
Juris
Civilis* of
Justinian.

14. Justinian’s work of codification was simply a completion in the East of the movement which had produced in the West, some thirty years before, the collections of laws made by the barbarian kings for the government of their Roman subjects. Long before their time Theodosius had laid down without executing the comprehensive plan which Justinian finally carried out. That plan involved no less than the codification of the mass of statutes (*leges*) and jurist-made law (*jus*) that had been accumulating during a period of a thousand years. As early as 528² Justinian informed the senate that he had nominated a commission of ten members, including Theophilus, who was a professor at Constantinople, and two barristers of distinction to compile a new code on the basis of the *Codex Gregorianus* and *Hermogenianus* (then counted among the *leges*), the *Codex Theodosianus* and the later ordinances. The work was finished and published in 529.³ When by reason of subsequent amendments, especially through the “Fifty Decisions,”⁴ a remodeling of the Code of 529 became necessary, it was repealed and a new one published

First Code
published
in 529,
second in
534.

¹ *Inst.* p. 95.

² *Const.*, “Haec quae necessario ” (of February 13, 528), which forms the first preface to the Code.

³ By a constitution of April 7, 529, addressed to Menna, one of the praetorian prefects, it was ratified under the name of *Justinianus Codex*. *Const.*, “Summa rei publicae,” — the second preface to the Code.

⁴ See below, p. 144.

in 534, which is the Code we now possess.¹ Its composition was committed by Justinian to Tribonian, Dorotheus, and two or three others under a commission not preserved, but whose scope is indicated in the *constitution Cordi nobis* of November 16, 534, whereby the new collection was ratified under the name of *Codex Justinianus repetitae praelectionis*. This Code, in twelve books, is a collection of imperial constitutions, including the separate decisions of the old type since Hadrian and the general ordinances of the new type, the earliest in the collection being a rescript of Hadrian's and the latest a law of Justinian's dated about a fortnight before the Code was published. Its arrangement follows that of the edict rather more closely than does the Digest, and it contains much in reference to political, ecclesiastical, criminal, municipal, fiscal, and military institutions that has no counterpart in the Digest. The collection contains over 4600 enactments, of which more than one half were originally rescripts, arranged chronologically under their several titles, the name of the emperor from whom each proceeded, and the body or individual to whom it was addressed being mentioned at the head of it, and the place and time of its issue (if known) at the end. By the *constitution Cordi nobis* of November 16, 534, addressed to the senate and prefixed to it, the second edition of the Code was given statutory force from December 29 of the same year. The name of Novels (*novellae constitutiones post Codicem*) is given to the enactments of Justinian subsequent to the publication of the Code, of which the greater number relate to public and ecclesiastical affairs. Those dealing with private law, especially

*Constitution
Cordi nobis.*

Arrange-
ment fol-
lows edict.

Novels

¹ All copies of the earlier Code have entirely disappeared, while the Code which has come down to us is in a comparatively incomplete form, a fact due probably to its not being prescribed as the subject of professional lectures at all, being left to private industry in the fifth year of study. A Veronese palimpsest (of the same date as the Florentine manuscript of the Digest) was at one time complete, but is now full of lacunae. The remaining manuscripts are all based on epitomes of the first nine books of the Code, the last three books being omitted as dealing merely with the public law of the Byzantine Empire.

New
legislation
and its
effects.

those reforming the law of intestate succession, are of the very highest importance. When we add Justinian's contributions to the Code, numbering about 400, to his surviving Novels, numbering about 170,¹ we have of his own legislation about 600 enactments. In these it is possible to trace the completion of the momentous changes made in the law of the family, in the law of property and obligation, and in the law of succession during the time of the Christian emperors. The church, the clergy, the monastic orders, and other matters pertaining to the Christian religion, so far as they could be drawn within the jurisdiction of civil law, stand out prominently in the Code, as they were frequently made the subjects of legislation by Constantine and his successors. The Code consists, to a much greater extent than the Digest, of public law, including criminal, in all its departments; that is, the law which regulates all state institutions, whether civil or ecclesiastical.

Making of
the Digest.

By the time of Justinian the *jus vetus*, or jurist-made law, was understood to include the republican statutes, *senatus consulta*, the edicts of the magistrates, the writings of the jurists, and the collections of early imperial ordinances, more especially of rescripts among which the Gregorian and Hermogenian codes were preëminent.² The early statutes were thus considered as *jus* because neither the tribunals nor the parties were in the habit of using the original sources of law in their original forms. All preferred to resort to the classical juristic literature where the results of these sources were fully worked out. The task of reducing that unwieldy mass to a manageable compass was committed by Justinian to a commission of sixteen, four law

¹ See Biener, *Geschichte der Novellen Justinians*, Berlin, 1824; Schoell's edition of the Novels, completed by F. Kroll and published at Berlin in 1895. The first knowledge the West obtained of the Novels was derived from the so-called *Epitome Juliani*, being a collection of extracts from 125 Novels of Justinian by Julianus, a professor of law in Constantinople, 556 A.D.

² Cf. Sohm, *Institutes*, pp. 82-86; Bryce, *Studies in History and Jurisprudence*, p. 709, note 1.

professors and eleven members of the bar, who were selected by and organized under the presidency of Tribonian, Quaestor of the Royal Palace and the author, no doubt, of the constitution, addressed to himself,¹ in which were laid down the lines upon which the collection was to be made. The commission was divided into three sections, each of which was instructed to extract a particular group of writings. The group of works dealing with the *jus civile*, called the "Sabinian group," because the staple of these works consisted of the writings of Sabinus and his commentators, was assigned to the first section. The group of works dealing with the praetorian edict, called the edict-group, was assigned to the second section. The works dealing with separate legal questions and cases, called the "Papinian group," because in them the writings of Papinian and his commentators transcended all others in importance, were assigned to the third section,² each section extracting the works allotted to it so far as they bore on each particular subject. Each law or fragment is an excerpt from some treatise of an earlier jurist which, in compliance with Justinian's instructions, is invariably quoted at the commencement. The considerable number of books³ thus drawn upon were from the pens of thirty-nine authors, the earliest being Quintus Mucius Scaevola, the only jurist of the Republic from whose work any direct extract is preserved.⁴ The largest contributor is Ulpian, who furnished about one third of the whole Digest, the greater part being from his Commentary on the Edict. Paul, who supplied about one sixth of the whole, comes next, and is followed in the order of

Commission
headed by
Tribonian.

Divided
into three
sections.

Each law
an excerpt
from an
earlier
jurist.

Principal
contribu-
tors.

¹ *Const.*, "Deo auctore" (in the preface to the Digest and again in *Cod.* i. 17, 1) of December 15, 530, instructing Tribonian to undertake the composition of the Digest.

² Some extracts from such writings as had, in the first instance, been overlooked or set aside were subsequently inserted in the so-called "Appendix-group." Bluhme, *ZS. für geschichtliche RW.*, vol. iv. (1820), pp. 257 ff.

³ About 2000 books, in the Roman sense.

⁴ Roby, *Introduction*, p. cxxiii.

their importance, so far as the bulk of their contributions is concerned, by Papinian, Julian, Pomponius, Q. Cervidius Scaevola, Gaius, and Modestinus.¹ As that mighty line of pagan jurists had come to an end some time before Christianity ascended the imperial throne, it is not strange that the Digest is silent as to its officers and institutions. This human, heathen Digest embodies the science of civil life as it existed at Rome before the social fabric was affected by Christian influences.² All moot points in the law which could be satisfactorily settled only by imperial authority were determined as the work progressed by a series of imperial ordinances of Justinian known as the "Fifty Decisions" (529-532).³ The purpose of the compilation was to bring together in one collection the decisions of the leading juriconsults, and the maxims, rules, and illustrations of the most eminent text writers, and to arrange them according to the general plan adopted by Julian in the consolidation of the edict. While the commission was required, on the one hand, to adhere to the general design, by inserting at the head of each extract the name of its author and the particular treatise from which it was taken, it had, on the other, a very large discretion in its choice of materials and in the mode of dealing with them.⁴ As it was the emperor's purpose to publish, not a historical view of the law, but a practical code containing an

No
Christian
elements.

The
"Fifty
Decisions."

Authority
of the com-
missioners.

¹ Cf. Hommel, *Palingenesia libror. juris veterum* (3 vols., Leipzig, 1767); Lenel, *Palingenesia juris civilis* (2 vols., Leipzig, 1888-1889).

² "Une science nouvelle naquit, indépendante et laïque, la science de la société civile, telle que l'avaient dégagée les Romains, et qui pouvait passer pour le chef-d'œuvre de la sagesse humaine. . . . Il en résulta qu'à côté du théologien se plaça le légiste qui avait, comme lui, ses principes et ses textes, et qui lui disputa la direction des esprits avides de savoir." Esmein, *Cours d'histoire du droit français* (ed. 2), p. 347.

³ "Nostras constitutiones, per quas, suggerente nobis Triboniano . . . antiqui juris altercation esplacavimus" (Just. *Inst.* 1, 5, 3). Cf. Savigny, *Gesch. d. r. R.* ii. 452, as to the possible existence of the *Quinquaginta Decisiones*, as a separate collection, prior to their incorporation into the second edition of the Code.

⁴ The commissioners were expressly exempted from the rules of the Law of Citations, which declared that where the jurists differed, a majority of voices should decide (i. 17).

authoritative statement of it, the commissioners were empowered to remove redundancies, to alter expressions, and even to interpolate a word or phrase where it was deemed expedient.¹ The outcome was a work in fifty books, each being subdivided into titles, each title into "fragments" or "leges."² The arrangement of the fifty books of the Digest in seven parts is thus explained by Justinian in his second preface: "We have divided this work into seven parts, and have not adopted this division by chance and without reason, but upon consideration of the nature and mystery of those numbers, and so making an arrangement appropriate to them."³ The Digest, or Pandects (*Digesta*, *Pandectae*), was published on December 16, 533, with statutory force from December 30 of the same year.⁴

Digest, or
Pandects,
published
December
16, 533.

Before the completion of the Digest a short text-book of Justinianian law known as the Institutes, primarily intended for use in the schools, was composed by Tribonian and, under his supervision, by the two professors, Theophilus and Dorotheus.⁵ In the early Empire the teaching of the law was free.⁶ It is probable that state recognition of law teaching did not begin before the time of Diocletian when it was accorded to the schools of Rome and Beirut. Not until a

Text-book
known
as the
Institutes.

¹ This is the explanation of the so-called "interpolations" (*emblemata Triboniani*) by means of which the selections from the classical jurists were brought into harmony with the law of Justinian's time. Eisele, *Zur Diagnostik der Interpolationen* (ZS. d. Sav. St. vii. 15 ff.); Gradenwitz, *Interpolationen in den Pandekten* (*ibid.*, pp. 45 ff.); Gradenwitz, *Interpolationen in den Pandekten*, 1887.

² All but the shortest of these fragments are subdivided into paragraphs. As to the various methods of citation, see Roby, *Introduction*, ch. 18.

³ Cf. Eyssenhardt, *Justinians Digesten nach Drittheilen, Partes, Büchern, Titeln, u. Fragmenten* (Leipzig, 1845), pp. 44 sq.; Roby, *Introduction*, pp. xxix sq. The division into seven parts had no significance except in regard to the then existing system of instruction.

⁴ Const. Tanta = const. Δέδωκεν. See Preface to the Digest and Cod. i. 17. 2.

⁵ Cf. Huschke, Preface to his edition of the *Institutes*, 1868, pp. vi sq.; Ed. Grube, *De Justiniani Institutionum compositione* (Argentorati), 1884.

⁶ See Heimbach, *Prolegomena Basilicorum* (Leipzig, 1870), bk. 1, ch. i., §§ 1-6, ch. ii., §§ 1, 2; Karlowa, *Röm. RG.* i. 1022 sq.

later time was it extended to those of Constantinople, Alexandria, and Caesarea. Prior to Justinian's reforms the course of study embraced a period of five years, the last two being given to private reading. The students of the first year (*dupondii*) devoted themselves especially to two books of Gaius's Institutes and four separate books of his (*libri singulares*) on dowries, tutories, testaments, and legacies. It is not, therefore, strange that the new introductory text-book¹ for the law schools should have been founded in the main, by the emperor's instructions, upon the Institutes of Gaius with some extracts from the elementary works of Marcian, Ulpian, Florentine, and other classical jurists. The compilers were instructed to expurge everything that was antiquated, and to introduce whatever in their judgment was necessary to make the new text-book a faithful though elementary exposition of Justinian law.² In that way a large amount of new matter was inserted displaying the amendments of the later emperors, among which special prominence was given in a boastful and pedantic form to the legislation of Justinian himself. By his command the right to teach the law was confined to the schools of Rome, Constantinople, and Beirout, all others being suppressed. The five years' course of instruction was continued, and the students encouraged to diligence by the promise of position and promotion in the public employment suited to their requirements.³ Justinian published the Institutes⁴ as a

Founded
on Gaius.

Law
teaching
confined to
Rome, Con-
stantinople,
and
Beirout.

¹ A Greek paraphrase usually attributed to Theophilus, one of Justinian's commissioners, contains much more historical matter, differently rated by different critics, than the Institutes. See *Institutionum Graeca paraphrasis Theopilo antecessori vulgo Tributa*. Ad fid. libror. manuscriptor, recensuit, E. C. Ferrini, 2 vols., Berlin, 1884, 1897.

² The most valuable manuscripts are those of Bamberg and Turin. There were many copies of the Institutes, and they were more widely read, even in the early Middle Ages, than the more voluminous Digest.

³ Justinian thus closes his direction to the professors: "Begin, then, to instruct, with the guidance of God, your scholars in the science of the law, and guide them in the way we have opened, to the end that they may be made worthy ministers of justice and of the Republic."

⁴ The document officially promulgating the Institutes was Const. Imperatoriam (proem. Inst.) of Nov. 21, 529 A.D.

part of his work with the same statutory force as the remaining portions, it being especially declared that they and the Digest and the Code should be regarded as integral parts of one great piece of legislation in which each part should be of equal authority. Everything within them was to be held as law; nothing outside them was to be looked at, even the volumes from which they had been collected. So far did this go that after the publication of the revised Code, neither the first edition of it nor the Fifty Decisions were allowed to be referred to. Outside of his collection the emperor remained the only fountain of the law; if a case arose for which no precedent could be found, he was to be resorted to as the sole and only organ of interpretation.¹

Code,
Digest, and
Institutes
of equal
authority.

Emperor
only foun-
tain of law.

From the nucleus thus established by Justinian at Constantinople the concentrated and refined light of Roman law, softened by the influence of Christianity and undimmed by the admixture of barbaric elements, streamed first over the Balkanic and Euxine countries, where its illuminating power was greatest, between the tenth and fifteenth centuries. The three that followed the completion of Justinian's work were comparatively barren of literary fruit.² Not until the end of the ninth did the emperor, Basil the Macedonian,³ with his son Leo, the Philosopher, undertake the production of an authoritative Greek version of the whole of the Justinian collections and legislation, with certain important omissions and amendments, the outcome of which was the Basilica,

Constan-
tinople as
the central
light.

The
Basilica.

¹ That explains the necessity for new constitutions (*novellae constitutiones*) issued in fairly large numbers by Justinian himself (535-565). As to the general history of Justinian's codification, see Krüger, *Quellen*, §§ 42-48 and § 53 sq.

² For an account of the writers who continued the literary work throughout the sixth century, see Heimbach, *Prolegomena Basilicorum* (Leipzig, 1870), *loc. cit.*

³ On account of its glaring imperfections and departures from the original, Basil repealed the *Ἐκλογή τῶν νόμων ἐν συντόμῳ γενομένη* of Leo the Isaurian, put forth in 740 as an abstract of the whole Justinian law amended and rearranged. Published in Zachariae's *Collectio librorum juris Graeco-Romani ineditorum*, Leipzig, 1852.

a code in sixty books, probably entitled originally The Revision of the Ancient Law (ἡ ἀνακάθαρσις τῶν παλαιῶν νόμων) and finally Imperial Law or the Imperial Constitutions (ὁ βασιλικὸς or τα βασιλικά). The *Scholia* to the Basilica, which have done good exegetical service for modern civilians, are additions made by Leo's son in the form of an official commentary collected from the writings of the sixth-century jurists.¹ While the Basilica retained their statutory authority until the fall of the Byzantine Empire in 1453, they had been long before practically abandoned; not a single complete copy of them is known to exist.² The first step in the progress of Justinian's works toward the West can be traced in his pragmatic sanction *pro petitione Vigilii*³ of the year 554, in which, after giving afresh his imperial sanction to the Digest and Code (*jura* and *leges*), he says that long before he had transmitted them to Italy, adding at the same time that his Novels were to be of the same authority there as in the East. Two years thereafter Julian prepared, possibly by command of the emperor himself, his Latin epitome of them; and there is good reason to believe that they all came at once to some extent into use, as there is preserved in Marini's collection the testament of one Mannanes, executed at Ravenna in the reign of Justinian's immediate successor, in which there is a scrupulous observance of the requirements of both Code and Novels.⁴ Despite the barrier in the form of the Lombard invasions, which for two centuries stood between Italy and the rest of Europe, checking the

Justinian's
works in the
West, 554.

Julian's
epitome.

¹ The so-called Παράγραφοι τῶν παλαιῶν.

² There is a manuscript in the Vatican containing an abstract of the Basilica called Tipucitos. A second supplement to Heimbach's edition of the Basilica (vol. vii.), by Ferrini and Mercati, with Latin translation, has been recently published (Leipzig, 1897). As to the fate of the Justinian books in the East, see Zachariae, *Historiae juris Graeco-Romani delineatio*, Heidelberg, 1839; Mortueil, *Histoire du Droit byzantin*, 3 vols., Paris, 1843-1846; Amos, *History of the Principles of the Civil Law* (London, 1883), pp. 392 sq.

³ Krüger, *Geschichte der Quellen des römischen Rechts*, p. 354; Hodgkin, *Italy and her Invaders*, vi. 519.

⁴ Muirhead, *Roman Law*, p. 404.

advance of the Justinian law northwards, it is claimed by some to have been taught without much interruption at Ravenna, the seat of the exarchs, to which it is said, upon doubtful authority, that the school (*studium*) of Rome, revived by Justinian, had been transferred.¹ Not, however, until Charles the Great's triumph over the Lombards, who allowed Roman law to be applied to Romans within their territory, was an outlet made for it beyond Italy.

School at
Ravenna.

Lombardy was the country in which the principle of personal law struck its deepest roots. Besides Lombards and Romani there were many Franks and Swabians who transmitted their law from father to son. In Pavia, which the Lombards had established as their capital, and where the "conflict of law" seems to have favored the growth of a mediating and instructed jurisprudence, a law school arose in the first half of the eleventh century. In it, by the aid of gloss and comment, students were striving to systematize the ancient Lombard statutes of Rothari and his successors. The Lombardists knew their Institutes, and before the eleventh century closed the doctrine that Roman law was a subsidiary common law for all mankind (*lex omnium generalis*) was gaining ground among them. Pavia passed the torch to Bologna, Lombardy to the Romagna.²

School
at Pavia.

While there is evidence to show that as early as the ninth century some, at least, of the Justinian law books were already in the hands of the clergy in various parts of Europe,³ the

¹ See *La Scuola delle leggi romane in Ravenna*, by V. Rivolta, Bologna, 1888; Fitting, in *Z. d. Sav. Stift.*, xvi. 49 sq.

² Boretius, Preface to edition of *Liber legis Langobardorum*, in M. G.; Brunner, *Deutsche Rechtsgeschichte*, i. 387 ff.; Ficker, *Forschungen zur Reichs- u. Rechtsgeschichte Italiens*, iii. 44 ff., 139 ff.; Pollock and Maitland, *History of English Law*, i. 21-22.

³ As to what was known of the ancient Roman texts prior to the eleventh century, see the summing up for English readers by Rashdall, *Universities of Europe*, i. 89 ff. The chief advocate of a maximum of knowledge is Dr. H. Fitting in *Juristische Schriften des früheren Mittelalters*, 1876, *Die Anfänge der Rechtsschule zu Bologna*, 1888. See also Conrat, *Gesch. der Quellen und Literatur des röm. Rechts im früheren Mittelalter*, vol. i., 1889-1891; Pescatore,

School at
Bologna.

Digest
ignored
by clergy.

Glossators.

real revival did not begin in Italy until toward the end of the eleventh,¹ the principal agent then being the school of Bologna, famous for many generations thereafter. There under Irnerius, who appears not to have been a professional jurist, the study of Roman law began somewhat suddenly to attract students from all parts of Southern Europe. Down to that time only the Institutes, the Code, and the Novels, owing no doubt to their abundant legislation on matters ecclesiastical, appear to have appealed to the clergy by whom the Digest, the pure product of pagan jurists, had been practically ignored. Its mere existence seems to have been almost unknown during a period of something like four hundred years. In 1076 the Digest was cited in the judgment of a Tuscan court.² Careful research has apparently failed to prove that it had been cited between 603 and that date. That the text³ of that far richer storehouse, with its more incisive reasoning and purer diction, was received in installments by Irnerius and his successors of the Bologna school, is indicated by the names given to the three parts into which they divided it, *Digestum Vetus* (bks. 1 to 24, tit. 2), *Infortiatum*, and *Digestum Novum* (bks. 39 to the end), — the suggestion being that after first the old and then the new Digest had come to light, the connecting link unexpectedly appeared. Hence the somewhat singular name by which it has

Die Glossen des Irnerius, 1888; Flach, *Études critiques sur l'histoire du droit romain*, 1890; Besta, *L'Opera d'Irnerio*, 1896.

¹ In 1038 Conrad II. ordained that Roman law should be once more the territorial law of the city of Rome. M. G. Leges iii. 40; Conrat, *loc. cit.*, i. 62. The University of Bologna observed 1888 as its octocentenary.

² Ficker, *Forschungen*, iii. 126, iv. 99.

³ The romantic story of the capture of an unique copy of the Digest of Justinian at Amalfi in 1135 has long been disproved. It has been preserved for us in a famous and most excellent manuscript which was known first as the Pisan and subsequently as the Florentine manuscript. It was written at the beginning of the seventh century by Greek scribes. It forms the basis of the numerous manuscripts which contain the text of the Digest as adopted by the glossators or teachers of Roman law at Bologna in the twelfth and thirteenth centuries.

been since known. As to all the facts concerning the MSS. of the Digest, see Mommsen's great edition (*Digesta Justiniani Augusti*, 2 vols., 1870) in which his critical researches are laid before us. The collection as a whole was distributed into five volumes by the glossators, as the members of the Bologna school were called, because of the *glossae*, notes marginal and interlinear, with which they enriched them from the rise of the school with Irnerius until its close with Francesco Accursi in 1260.¹ Thus it was that Roman law entered upon its new career in the West, radiating from Italy over the lands that lay north and west of her from the twelfth to the sixteenth century. Thereafter Spain, France, Holland, and Germany became the chief propagators of the imperial law, all through their universities and jurists, and the three first named through the instrumentality of colonization.² And here the fact should be emphasized that in the legal history of nations that part of the law which has the greatest importance for the ordinary citizen, the private civil law of family and property, of contract and tort, is the part least affected either by political change or by direct legislation. Evolved, as it is, slowly and almost imperceptibly, first by popular custom, then by the refining hand of the jurist and the judgments of the courts, it grows unaffected by direct legislation, except when the supreme power is forced to expurge some error too firmly rooted for judicial remedy, or to define existing usage and condense it within the limits of a code. It is the private law of Rome thus developed, and based on principles of natural equity and universal reason which have not lost their force with the altered circumstances and advanced civilization of more recent times, that has passed on to the modern world. It is

New
career of
Roman law
in the West.

Only
private law
of Rome
survived.

¹ For a treatment of the glossators and the medieval universities, see Savigny, *Geschichte des Römischen Rechts*, vol. iii.; Conrat, *Gesch. der Quellen und Litteratur des röm. Rechts im früheren Mittelalter*, vol. i., 1889-1891; Fitting, *Summa Codicis and Questiones des Irnerius*, 2 (separate) vols., 1894.

² See Bryce, *Studies in History and Jurisprudence*, p. 89, "The Extension of Roman Law after the Fall of the Western Empire."

mainly by reason of the private law embodied in the *Corpus Juris*, of which the Digest contains a far greater proportion than the Code, that the jurisprudence of Rome has been able to survive the city-state that evolved it. As heretofore pointed out, the state system of modern Europe, in which the state as the nation is the sovereign unit, swept away and superseded the ancient state system in which the city-commonwealth was the sovereign unit. That change made necessary the rejection by the modern European states of the public law of Rome, constitutional and administrative, because entirely inapplicable to widely dissimilar conditions.

Extension
of Roman
law to the
provinces.

15. At the close of the Republic the Roman provinces numbered fifteen, including Gallia Narbonensis, Gallia Cisalpina, Hither and Further Spain.¹ The idea of a province was that of an aggregation of states (*civitates*), natural political associations whose corporate organization varied widely. Where Greek and Phoenician civilization dominated such states were cities, but sometimes, as in Gaul and Spain, they were simply cantons and tribes. The rights of the cities that were only "free" (*liberae*) rested upon charters revocable at any time, while the rights of those *liberae et foederatae* rested upon sworn treaties (*foedus*), a breach of which was either an act of war or its result.² The less favored states which belonged to neither of these classes were tributary (*stipendiariae*), and as such possessed only the collective guarantee

Rights of
cities,
free and
tributary.

¹ The remaining provinces were Sicily, Sardinia, Illyricum, Macedonia, and Achaia (separated by Caesar), Africa, Asia, Bithynia, Cyrene with Crete, Cilicia, and Syria.

² The rights of the one were guaranteed by a revocable charter (*lex data*), which as late as 71 B.C. was still an utterance of the people (*lex rogata*); the rights of the other were guaranteed by an irrevocable agreement sworn to by the *fetiales*. The rights common to both groups of states generally included the control of their own finances, a free enjoyment of their land, which exempted them from the payment of tribute, and above all a use and enjoyment of their own native laws. See the clause in the *lex Antonia de Termessibus*, 71 B.C. (Bruns, *Fontes*), which confers autonomy "so far as is consistent with this charter" (i. 1. 7, "eique legibus suis ita utunto . . . quod advorsus hanc legem non fiat").

contained in the law of the province (*lex provinciae*), usually the work of the conquering general himself, assisted by ten senatorial commissioners (*decem legati*) appointed by the senate; and it continued to bear the name of its chief creator, as in the cases of the *lex Rupilia* in Sicily, the *lex Aemilia* of Macedonia, the *lex Pompeia* of Bithynia.¹

That law reestablished the states of a conquered district, it gave to them certain ultimate rights, it defined the burden of the tribute, it specified the particular circuit courts which the citizens of the various towns were to attend, and it prescribed regulations which the governor was expected to observe as to national and international jurisdiction.² The provinces in which the Romans thus assumed to maintain order, to collect revenue, and to dispense justice were, first, those organized in such civilized countries as Sicily, Achaia, Macedonia, and the provinces of Western Asia Minor, as well as Africa, where law courts already existed in the cities with summaries or codes of existing law; second, those organized in such backward communities as Thrace, Transalpine Gaul, Britain, and Spain, where there existed nothing more definite than tribal usages suited to their primitive condition. All of these provinces embodied two classes of inhabitants: the one including those who enjoyed Roman citizenship, either by birth or grant,³ and to whom pure Roman law was applicable, subject, of course, to any local customs; the other including the provincial subjects, who, in the view of Roman law, were aliens (*peregrini*) and to whom Roman law was primarily inapplicable.⁴

Provinces
of two
kinds.

Two classes
of inhabit-
ants.

¹ Cic. *In Verr.* ii. 13. 32; 15. 37; Liv. xlv. 17, 32; Plin. *Ad Traj.* 79 (83). 1.

² See Greenidge, *Roman Public Life*, pp. 245, 283, 317 sq.

³ Mr. Bryce refers to the natives of cities on which (as to Tarsus in Cilicia, St. Paul's birthplace) citizenship had been conferred as a boon; that is, the citizenship which carried with it private civil rights, including Roman family and inheritance law and Roman contract and property law, such rights as the Romans call *connubium* and *commercium*. *Studies in History and Jurisprudence*, p. 76 and note 3.

⁴ See above, p. 94.

Provincial
governor.

His court
for Roman
citizens.

Provincials
lived on
under their
own law.

Importance
of the edict.

Civil
jurisdiction
based on it.

Every province was administered by a governor with a staff, whose chief members were one subordinate magistrate, the quaestor, and certain senatorial commissioners (*legati*), one of whom was usually assigned to a praetorian, and three to a consular, province. Just as the consuls at Rome originally possessed judicial as well as military and civil powers, and just as the praetor at Rome, though usually occupied with judicial work, had also both military and civil authority, so the governor was the head of the judicial as well as the military and civil administration. His court was the proper tribunal for those who enjoyed Roman citizenship, and for whom no special law was needed. The provincials lived on under their own law, whatever it might be, subject to such modifications as were made by the edict issued by the governor, and setting forth the rules he proposed to apply during his term of office. As the attempt to substitute her own for the native law was at first abhorrent to the political sense of Rome, her most ambitious representatives never attempted to make their edicts into codes. The importance of the edict was chiefly felt in matters of international private law, administrative jurisdiction, and procedure. It issued rules for the settlement of claims made by the *publicani*, and it supplemented the law of the province by framing regulations for the conduct of private suits. Although the unity and continuity of its life may have depended too much on the discretion of the individual governor, it still had a continuous existence; the edict of each province was a separate entity and drew its name from the country to which it directly applied.¹ The civil jurisdiction of the governor was based on the edict, was either personal or delegated, and in both cases required the visitations of

¹ E.g. "Edictum Siciliense" (Cic. *In Verr.* i. 45. 117). The edict might be composed at Rome, and its author might copy from more than one original. Cic. *Ad Fam.* iii. 8. 4. The makers of edicts could not hope to anticipate everything. Cicero found it wiser to leave the third part of his edict "unwritten."

circuits (*conventus*, *διοικήσεις*),¹ into which the province had been divided at the time of its organization. The edict seems to have contained certain legal regulations intended to indicate the action which the governor's court would take not only in disputes between Roman citizens, but also in those between citizens and aliens, and probably also to some extent in those between aliens themselves. In Sicily, the only province the details of whose *lex* are known, it was ordained that in a suit between two citizens of the same state, the trial should be held in that state and according to its laws,—a regulation which certainly guaranteed the native *judex* and the native code, but which did not, perhaps, inhibit an appeal to the governor or take away his right of interpreting the law. If a Sicilian of one state sues a Sicilian of another, the governor is to provide the *judex* or *judices* by lot.² In the more civilized provinces the local city courts, in cities municipally organized, doubtless continued to administer their local civil law; and in the so-called free cities, which had come into the Empire as allies, these local courts had for a long time a wide scope for their action. Where the provisions of the edict did not apply, aliens would, of course, be governed by their own law. While the governor possessed unfettered criminal jurisdiction over members of the stipendiary states, it is not probable that he often exercised it. He might summon any case into his court, but ordinary crimes he doubtless left to the judicial machinery of the states themselves.³ Cases of a grave political character, such as those connected with sedition or a popular uprising,

Lex of
Sicily.

Wide scope
of local
city courts.

Governor's
criminal
jurisdiction.

¹ Cic. *Ad Fam.* iii. 8. 6. The governor held a court in each circuit in turn, according to a programme of the assize determined beforehand. Cic. *Ad Att.* v. 20. 1; *Ad Fam.* iii. 8. 4 and 5.

² "Siculi hoc jure sunt ut quod civis cum cive agat, domi certet suis legibus; quod Siculus cum Siculo non ejusdem civitatis [agat], ut de eo praetor judices ex P. Rupillii decreto . . . sortiatur." Cic. *In Verr.* ii. 13. 32.

³ "Possibly certain kinds of criminal jurisdiction were guaranteed to cities by the *lex provinciae*. The senate of Catina, in Sicily, tried a slave (Cic. *In Verr.* iv. 45. 100)." *Roman Public Life*, p. 327, note 8. See also pp. 318, 321, 325 sq.

the governor generally sent to Rome for trial.¹ Although over Roman citizens in the provinces he possessed an autocratic power in a military sphere to which the *provocatio* did not extend, in obedience to a custom seldom disobeyed, he remitted to Rome for trial all capital charges against them.

Athenian
Areopagus.

In St. Paul's time, however, the Athenian Areopagus would seem to have retained its jurisdiction,² as the Romans treated Athens with special consideration. When the governor did pronounce a criminal judgment against a Roman citizen, it seemed to be understood that he should inflict no degrading punishment.³ It thus appears that the governor's court was a tribunal for the graver criminal proceedings, and for the hearing of cases between Roman citizens, between such citizens and aliens, and in some instances of suits between aliens, as, for instance, between aliens belonging to different cities. The rule, doubtless, was for the governor to disturb provincial usage as little as possible. Popularity was not to be won either by introducing Roman law or by bringing about artificial uniformity.⁴ And yet the natural tendency was toward a gradual assimilation of Roman and provincial law as the number of Roman citizens increased, as the provincial administration, with its regular body of bureaucratic officials established by the monarchy, became better organized, as the jurisdiction of the governor's court, supplemented in the course of time by lower courts administering law according to the same rules, extended itself, and as the law applied to disputes arising between citizens and non-citizens became more copious and definite. So far as direct legislation was con-

Gradual
assimilation
of Roman
and provin-
cial law.

¹ Cic. *In Verr.* i. 33. 84 (of an *émeute* at Lampsacus).

² Cf. Acts xvii. 19.

³ Cic. *In Verr.* v. 66. 170. For the threat of capital punishment on a Roman citizen, see Cic. *Ad Q.*, fr. i. 2. 5; for its apparent execution, Diod. xxxvii. 5, 2.

⁴ A disregard of all kinds of law was one of the charges against Verres. Cicero says that, under him, the Sicilians "*neque suas leges neque nostra senatus consulta neque communia jura tenuerunt.*" *In Verr.* i. 4. 13.

cerned, there was no need for it in the domain of private law, first, because any alteration made in Roman law proper altered it for Roman citizens dwelling in the provinces; second, because the edict of the governor and the rules which the practice of the courts established were sufficient to introduce any needed change, so far as provincial aliens were concerned. There was, however, in the domain of public law an unparalleled amount of legislation intended for the protection of provincials in enactments dealing with the ordering of the provinces, the rights of magistrates, and with extortion (*de provinciis ordinandis, de jure magistratuum, repetundarum*).¹ And here the fact should be emphasized that while the unification of Roman and provincial law was thus progressing, Roman law itself was being transformed, as heretofore explained, from an archaic and highly technical system of rigid rules into a body at once equitable and elastic, through the infusion of new principles drawn from the *jus gentium* in order to make the *jus civile* applicable at Rome to controversies between Romans and aliens. Thus while the provinces were being Romanized, they were drawing from the ruling city its enlarged and improved system of law in a form which made it specially adaptable to their local conditions. In point of time the two processes substantially synchronize with each other. While at the end of the period indicated dissimilarities in the law of the family relations and inheritances were still significant, the law of property and contract, with some few exceptions,² of penal law and legal procedure, was practically identical. Such was the outcome of the

Direct
legislation
as to
private law.

As to
public.

Effect at
Rome of
jus gentium
on *jus civile*.

¹ The nearest approach to provincial self-government was represented by the provincial councils which seem to have existed in all, or nearly all, of the provinces from the time of Augustus down to the fifth century. They consisted of delegates from the cities of each province who met annually in some central place. As to their lack of real power and importance, see Marquardt, *Römische Staatsverwaltung*, vol. i., and an article in English, *Historical Review* for April, 1893, by E. G. Hardy.

² "Such as the technical peculiarities of the Roman *stipulatio* and the Greek *syngraphe*." Bryce, *Studies in History and Jurisprudence*, p. 83, note 1.

Outcome
of the
process of
assimila-
tion.

process of assimilation — accelerated, no doubt, by the copious flow of direct imperial legislation intended for citizens and aliens alike, and by the judicial action of the emperor in matters brought before him as supreme judge of appeals from inferior tribunals — prior to the elimination of all distinction between citizens and aliens by the famous edict of Caracalla granting full citizenship to all free inhabitants of the Empire. Despite the lack of clear and definite information as to this enactment,¹ which must have been made between the years 212 and 217,² it may be safely assumed that it finally did away with the necessity for the *jus gentium* as a separate positive system, and that, by conferring citizenship on all or nearly all³ provincial peregrins, it subjected them in all their relations to the law of Rome, and qualified them for taking part in many transactions, both *inter vivos* and *mortis causa*, which previously had been incompetent for them. The Empire had but one law from the time of Caracalla (211–217 A.D.) down to the death of Theodosius the Great (395 A.D.).

But one law
from Cara-
calla to
Theodosius.

¹ Justinian (*Nov.* 78, c. 5) incorrectly attributes it to Antoninus Pius. Gaius, who is the best authority for the middle period of the law, lived fifty or sixty years earlier; the compilers of Justinian's Digest lived three hundred years later. The annals of the epoch are lamentably scanty.

² Dio Cass. lxxvii. 9; Ulp. in *Dig.* i. 5, 17. It cannot be doubted that its primary purpose was purely fiscal. The tax of five per cent imposed by Augustus on inheritances and bequests above a certain amount, except where the heir or legatee was a near kinsman of the deceased (it did not apply to successions *ab intestato*), and continued with profit by his successors, affected only the successions of Roman citizens, — it did not affect the great mass of the provincial population. In order to increase his revenue Caracalla not only increased the tax temporarily to ten per cent, but widened its operation by elevating all his free subjects to the rank of citizens. The very inclusive words of Ulpian, as to which there is much controversy, are: "In urbe Romano qui sunt . . . cives Romani effecti sunt." As to the general nature and effect of the edict, see Gibbon, *Decline and Fall*, i. 185, 193 sq.; Guizot, *History of Representative Government*, pp. 181 sq.; Maine, *Ancient Law*, p. 139; Sohm, *Institutes*, pp. 81, 117, 119; Muirhead, *Roman Law*, pp. 318 sq. As to the non-application of the law of Augustus to successions *ab intestato*, see Puchta, *Cursus*, § 313; Paul, *Sent.* iv. 6; Girard, *Droit romain*, p. 818.

³ Sohm says, "The only *peregrini* left were the *peregrini deditionii*, i.e. aliens whose community had been destroyed and who had therefore no place which they could claim as their home and where they were entitled to reside." — *Institutes*, p. 117.

And yet there is good reason to believe that the preëxisting law of different provinces or districts was not completely superseded by the one stroke involved in Caracalla's extension of citizenship. It appears that many difficulties arose that had to be removed by further and not always consistent legislation. In the East it is clear that some Roman principles and maxims were never fully understood by the mass of the people, while others never succeeded in displacing altogether the local rules to which they were most attached. Dr. Mitteis has demonstrated that both in Syria and Egypt the old native customs, remolded by Greek law, held their own even down to the sixth or seventh century.¹

Exceptions
as to the
East.

16. During the reign of Augustus the work of consolidating Roman dominion in Spain was completed; from the north to the south the country was fairly conquered; the people had accepted the Latin tongue and Latin civilization. For the next four centuries Spain, while in the enjoyment of the Roman peace, had no military history. Under the Empire the province was divided for purposes of administration into fourteen provincial assemblies (*conventus*) made up of a union of so many communities or townships, including the *colonia* originating in a camp granted to old soldiers, the town whose inhabitants had been made Roman citizens in the fullest sense, the town that had the inferior franchise (*jus Latii*),² the "free" town which might at any time have its freedom taken from it, and the "tributary" town. Upon the provincial substructure thus constituted classical jurisprudence was superimposed. The law of Spain was the law of Julian, Gaius, Papinian, Ulpian, and Paul, as applied and extended by imperial decrees and constitutions, and as modified by the

Roman
private law
in Spain.

Adminis-
trative
divisions.

Classical
juris-
prudence.

¹ See his *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*, ch. vi.

² Vespasian conferred the *jus Latii* upon the whole of Spain. As to the two forms of the *jus Latii*, cf. Gaius, I. 96; O. Hirschfeld, *Zur Geschichte des lateinischen Rechts* (Festschrift für d. archäolog. Institut in Rom, Vienna, 1879).

"Customs
of the
Goths."

Breviarium
of Alaric II.,
506.

Fuero
Juzgo,
687-700.

local situation. Such were the conditions existing, as to government and law, at the time of the founding of the Visigothic kingdom in Spain which lasted from 418 to 711, when it gave way before the Saracen invasion. After the conquest of the peninsula the Gothic King Euric (466-485) caused the "customs of the Goths" to be reduced to writing and embodied in a code¹ whose comparatively recent discovery has deprived the *Lex Salica* of its claim to be the oldest extant statement of Germanic customs.² This famous monument of German tribe law, made for the government of the Goths themselves, was followed by the making in 506 of the *Breviarium* by King Alaric II., for the government of his Roman-born subjects, an account of which has been given heretofore.³ The *Breviarium* was in force in Spain during the two centuries preceding the definite formation of the *Fuero Juzgo*, or until the promulgation of the notable law which prohibited the use of other than Gothic laws.⁴ That code, whose title is probably a corruption of *Fori Judicium*,⁵ was not definitely compiled until the sixteenth council of Toledo (687-700),⁶ a type of national assembly, with ecclesiastical elements, closely analogous to the Old-English wite-nagemote. Designed to bring about a unity in the laws,

¹ Published perhaps between 470 and 475. Zeumer, *Leges Visigothorum Antiquiores*, 1894; Brunner, *Deutsche Rechtsgeschichte*, i. 320, 1887; Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, p. 230, 2d ed., 1894.

² Cf. Brunner, *l.c.* i. 292 ff.; Esmein, *Cours d'histoire du droit français*, pp. 102 ff.; Dahn, *Die Könige der Germanen*, vii. (2) 50 ff.; Hessels and Kern, *Lex Salica*, the ten texts, 1880.

³ See above, p. 138.

⁴ 8a, tit. 1, bk. 2 of the *Fuero Juzgo*. Prior to that time there were in force two bodies of laws springing from different sources and having different characteristics, the Gothic code of Euric and the Roman code of Alaric. For a clear and concise statement as to the contents of each, see Walton, *Civil Law in Spain and Spanish America*, pp. 31-58.

⁵ Or rather *Fuero Juzgo* is a contraction of *Fuero de los Jueces*, which in turn is a modification of the words *forum judicium*. It might be translated as a code or guide for the judges.

⁶ During the reign of Egica. See view of Mariana, *Ensayo historico-crítico sobre la antigua Legislación y principales Cuerpos Legales de los Reynos de Leon y Castilla*, i. 41.

rendered so necessary by the union of the two peoples, it was enacted for all Spaniards in 'an assembly overshadowed by the power of the clergy, and therefore naturally bearing a distinctively Roman and ecclesiastical impress.' To the supremacy then secured to the king and the clergy were due, no doubt, the extraordinary powers afterward wielded by the Inquisition. On the other hand, the fact should be remembered that the laws which the code contained, often combining the wisdom of old Rome with the kindly spirit of Christianity, recognized the equality of all men in the eye of the law, and rejected such barbarisms as the assessment of a man's value according to his rank and position, judicial combat, and trial by ordeal.¹ While by the progress of the Saracenic invasion the influence of the *Fuero Juzgo* was greatly diminished, it was not entirely extinguished; it lived on in the Asturias, and later it reigned as the only law in Leon, Navarre, and Castile until changed conditions, and the necessity for the granting of rewards in the struggle made imperative the concession of special privileges or *fueros*² within the districts reconquered by the Christian host. During the period beginning with 712³ and ending with 1348 the legislation of Spain is known as local or foral, because of its special or local character. The work of unification began with Alfonso X., the Wise, king of Castile and Leon, who, after raising the University of Salamanca to the rank of the great schools of Paris and Oxford, published, probably in 1263, the *Siete Partidas*,⁴ one of the legislative monuments of an age that produced the *Établissements* of St. Louis and the great statutes of Ed-

Depressed
but not ex-
tinguished
by Sara-
cenic inva-
sion.

Work of
unification.

*Siete
Partidas.*

¹ As to West Gothic laws, see Guizot, *History of Civilization*, Lect. 3, 6, 10, 11.

² As to the five different meanings attributed to the word *fuero*, not including the processal use of the word, see Mariana, *l.c.* bk. 4, no. 1.

³ The battle of Guadalete, which marks the overthrow of the Goths and the beginning of Moslem dominion, occurred in July, 711.

⁴ The work was begun in 1256, and it was probably published in 1263. The official name *Partidas* was not officially given it until 1347 by Alfonso XI.

Approved
in 1348.

Fuero Real,
1255.

*Consolato
del Mare*.

ward I. Although drawn up under Alfonso X. it did not finally supersede the ancient *fueros* until 1348, when it was formally approved by the Cortes in the *Ordenamiento* of Alcalá.¹ By this, the most scientific work published on law up to that time, its materials being largely drawn from Roman sources a stamp of unity was impressed upon the monarchy, while the municipal codes were stifled, and the spirit of localism and feudal anarchy that had dominated the legislation and customs of Castile greatly depressed. The *Partidas* are still worthy of study because fundamental in the law of Spain and her colonies.² Prior to the compilation of the *Siete Partidas* and preparatory thereto, Alfonso X. promulgated in 1255 the *Fuero Real*,³ a treatise that may be said to bear the same relation to the legal system of Spain at that time that the Institutes of Justinian bore to his Digest, its composition being the outcome, no doubt, of the general revival of legal studies and of the works of Justinian which had extended from Bologna to Spain, France, and England. While that revival was opening a magazine of new ideas and principles to jurists and statesmen, the revival of commerce was producing codes of maritime law, first among which was the famous *Consolato del Mare*, probably compiled not later than the fourteenth century by order of the magistrates of Barcelona, the chief seat of the maritime tribunals of Catalonia.⁴ In it is contained the earliest collection of the laws and cus-

¹ See Law I., tit. 28, of the *Ordenamiento Real de Alcalá*, reproduced in Law I. of Toro, and to be found also in *Nueva* and *Novísima Recopilación*.

² It is divided into seven parts, as its name implies, possibly in imitation of the seven parts of the Digest of Justinian. It was known originally as *Libro de las Leyes* or *Fuero de las Leyes*.

³ There is an edition by Montalvo, 1500, another by the Academy of History of Madrid, 1836. It is divided into four books, comprising seventy-two titles and five hundred and forty-five laws.

⁴ Probably called *Consolato* because it embodied the rules according to which the judge-consuls established in the maritime cities of Spain determined the controversies brought before them. Cf. Twiss, *The Law of Nations*, i., § 206. See also Pardessus, *Lois Maritimes*, iv. 256; v. 108, 116 sq. The first edition was published in the Catalonial dialect at Barcelona in 1494; the best is that of Pardessus.

toms of the sea in time of war.¹ Passing over the *Ordenamiento Real*, a collection made by the jurist Montalvo during the reign of Ferdinand and Isabella, and the *Leyes de Toro* formed in the Cortes of Toledo (1502), in order to correct defects and supply omissions in existing legislation, it is necessary to notice next *La Nueva Recopilación*, sanctioned by Philip II., in 1567, and comprising all laws, not considered abrogated, published since the *Fuero Real* and *Partidas*.² In order to remedy the deficiencies of a work which rather increased than diminished obscurities in legislation, Charles IV. charged Juan de la Reguera Valdelomar with the task of making a new and complete codification which appeared in 1802, as *La Novísima Recopilación*, its legal force dating from the royal decree of July 15, 1805. Not until after a long interval was that hasty and confusing attempt³ to remedy the failings of its immediate predecessor followed by the admirable codifications now in force. Their final adoption was hindered and delayed by the fact that the populations of the various provinces tenaciously guarded, sometimes with arms in their hands,⁴ the many and local *fueros*, charters, and customs which no such thing as the French Revolution and consulate had ever enabled Spain to sweep away. Only after the making of large reservations in favor of such local rights and customs did the determined movement begun in 1850 to revise and codify the laws culminate in the Criminal Code of 1870, the Code of Civil Procedure of 1881, the Code of Criminal Procedure of 1882, the Commercial Code of 1885, the

La Nueva Recopilación, 1567.

La Novísima Recopilación, 1805.

Codes of 1870, 1881, 1882, 1885, 1889, 1893.

¹ *The Venus*, 8 Cranch (U.S.) 253; 2 Azuni, II., ch. III., Art. 1.

² The ancient codes of Spain were published in full in two volumes, by Marcello Martinez Alcubilla in 1885, at Madrid.

³ See the criticism of Marina in his *Juicio crítico de la Novísima Recopilación*.

⁴ While minister plenipotentiary of the United States to Spain, the author was once besieged in the hotel at San Sebastian, which happened for the moment to have as its guest the Prime Minister Sagasta, who visited the summer capital for the purpose of obtaining the queen's assent to a law taking away certain local and immemorial rights as to taxation. There was some loss of life before the mob was dispersed.

Civil Code of 1889, and the Hypothecary Code of 1893. The Code of Civil Procedure represents the Roman practice under the later Empire, while the Civil Code, which follows the divisions suggested by Gaius as to persons, things, and actions, resembles in its general plan the Code Napoléon as well as the civil codes of Lower Canada, Louisiana, and Mexico. Mr. Alonzo Martinez, one of the most distinguished of Spanish jurists, is understood to have been one of its compilers, and so admirably was the task performed that Mr. Levé, a French judge, writing in 1890, declared it to be even more scientific than the Code Napoléon. Spain transmitted Roman private law to Mexico, Central America, South America, Cuba, Porto Rico, and the Philippines unfettered, of course, by the local fueros, charters, and customs which had been developing in the peninsula for centuries. The general statement may be made that to these possessions passed during the colonial period the Spanish law of the sixteenth, seventeenth, and eighteenth centuries so far as it was applicable to colonial conditions.¹ The starting point was the *Siete Partidas*, which became fundamental in the colonies as in the mother country, and upon that general basis law was administered subject to such local regulations and decrees as were promulgated by the Council of the Indies, created by Ferdinand in 1511, but not fully organized until the reign of Charles V. in 1524, whose supreme jurisdiction over all colonies, and over all ordinances of governors and viceroys, included even the power to frame laws.² When France ceded the colony of Louisiana to Spain in 1763, the *Partidas* was introduced and became really a large

Spain
transmitted
Roman law
to the
Americas.

Starting
point *Siete
Partidas*.

Council of
the Indies.

Partidas in
Louisiana.

¹ Cf. Howe, *Studies in the Civil Law*, pp. 143-149.

² The two great authorities on the history of the laws of the Indies are Bartolomé de las Casas, philosopher and missionary, and Pereira Solorzano, who was a judge in the Indies, and a member of the Council of the Indies. Its enactments were digested and published in 1661 in the *Recopilación de las leyes de las Indias*, the only authentic collection of the ordinances and decrees governing Spanish America prior to 1680. Subsequent editions were printed in 1756, 1774, 1791, and 1841.

part of the fundamental law of that vast domain, some of its provisions surviving as a part of the law of the state of Louisiana.¹

Before Spain was deprived of her dominion in Cuba, Porto Rico, and the Philippines those islands had received the benefits of her most recent codifications which still survive as the basis of existing law. Cuba was provided with a Criminal Code in 1879, with a Code of Civil Procedure in 1885, with a Commercial Code in 1886, with a Civil Code and with a Code of Criminal Procedure in 1889, and with a Mortgage Law in 1893. At substantially the same times codes, with identical titles, were provided for Porto Rico and the Philippines. In that form Roman law existed in these islands when they became subject, by virtue of the treaty of Paris of December 10, 1898, to the military occupation of the United States, by whose authority these codes were soon republished with English translations. The authority of preëxisting law, during such a military occupation, has been thus defined by the Supreme Court of the United States: "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transmitted from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with

Roman law
in Cuba,
Porto Rico,
and the
Philippines.

Civil
government
during
military
occupation.

¹ They are referred to in the earlier decisions of her Supreme Court. See *Beard v. Poydras*, 4 Martin 348. Portions of the *Partidas* were translated into French for the benefit of the inhabitants. A translation of the principal portions of the work into English was published in 1820 by Moreau-Lislet and Carleton.

the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power — and the latter is involved in the former — to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.”¹ A great opportunity was thus given to the War Department of the United States to define the powers, functions, and duties of military governments under such circumstances. The scientific part of that duty devolved, in the main, upon an eminent and clear-visioned jurist² who has formulated his *responsa* to questions submitted to him by the Secretary of War, as they might have been submitted by the praetor to a Roman jurisconsult, in a volume which is a valuable contribution to that branch of public law.

Roman
private law
in France.

17. Despite the fact that in Gaul the Teutonic invaders made their deepest impression, the fabric of the older society survived; it remained Roman and Christian; it did not become heathen and Teutonic. The Latin tongue survived; French

¹ Chicago, R. J. & P. Ry. Co. v. McGlinn, 114 U.S. 542, 546. See also Am. Ins. Co. v. Canter, 1 Pet. 42; Halleck, *International Law*, vol. ii. (Baker ed), pp. 434 sq.; Taylor, *International Public Law*, ch. ix., “Military Occupation and Administration.”

² Reference is made to Hon. Charles E. Magoon, whose volume is entitled *The Law of Civil Government under Military Occupation* (1902).

is nothing but Latin with a deep infusion of Teutonic words.¹ As in Spain the Roman law of the early Empire, a body of pre-existing law made elsewhere, became too firmly set to be uprooted by the Teutonic assault.² The law of the Empire was largely modified, however, by the "barbarian laws," as the Teutonic customary laws were called, — laws in which the primitive ideas of family, clan, status, torts, and penalties play an important part. And to the influence of these customary laws may be added the material modifications made by legislative power through laws (*Capitularies*) issued, with the assent, express or implied, of popular assemblies, by the kings of the "first and second race," from the sixth to the tenth century; or through ordinances of the "third race of kings,"³ from the latter part of the tenth century down to the French Revolution. From the reign of Louis XI., who crushed the older feudalism and substituted autocracy for anarchy, down to the time of Louis XVI. a notable series of enlightened ordinances, resembling in a way the constitutions of a Roman emperor, were published, relating to procedure, to officials, to registry of legal documents, to foreign judgments, to criminal law, and to commerce.⁴ But these did not affect local customs; or if so, only to a trivial extent. The southern portion of the country, which had fallen under the influence of the written Roman codes of the early part of the sixth century heretofore described, was known as the country of the written law (*pays du droit écrit*), while the northern, when it had ceased to be Gaul and had become France, was known as the

Law of the Empire modified by Teutonic customs and legislation.

Ordinances from Louis XI. to Louis XVI.

Pays du droit écrit and *pays du droit coutumier*.

¹ Freeman, *Norman Conquest*, i. 11.

² "In Gaul, even in the parts most settled by the Franks, the law of the Empire held its ground, though everywhere largely modified by feudal land usages." Bryce, *Studies in History and Jurisprudence*, p. 776.

³ As to the ending of the capitularies and the beginning of the *ordonnances*, see above, p. 136.

⁴ A notable example is that model of marine legislation known as the *Ordonnance de la Marine* of Louis XIV., published in 1681, and expounded less than a century later by Valin. The *Commentaire sur l'Ordonnance de la Marine* was published in 1760; the *Traité des Prises*, in 1763.

country of the customary law (*pays du droit coutumier*),—a law drawn in the main from local grants and charters, and from feudal land usages, differently applied in different provinces.¹

360 groups
of custom-
ary law.

It has been estimated that in the tenth century there were 360 kinds or groups of customary laws, including an equal number of lines of descent. Sometimes a custom prevailed throughout the whole of a province; at others it was confined to a town, or city, or to some small locality. When, in the trial of a cause in the provinces, no controlling rule could be found, resource was had to the more conspicuous Custom of Paris, that city, the center of civilization and learning, being distinguished for its revival of the study of the Roman law, especially in the twelfth and thirteenth centuries. When that revival began, French jurists were called upon to deal with Roman law as modified by a bewildering variety of Teutonic customs, and not with a body of law truly national, in the sense either of having a distinctive national quality or of embracing the whole nation or of having been enacted by a national legislature, — the French states-general, even before their long eclipse, never having been an effective legislature.

Custom
of Paris.

Problem
confronting
French
jurists.

Work of the
glossators.

An account has been given heretofore of the work of the glossators through whose labors the contents of the *Corpus Juris Civilis* were made accessible and intelligible to the Western world. Their notes or *glossae*, originally designed to explain an occasional difficulty in words or expression, finally expanded into a full and continuous commentary on the Digest, Code, Institutes, and Novels. In order to lessen the inconvenience to the student resulting from the number of the commentaries or *glossae* thus produced, Accursius, about the middle of the thirteenth century, worked them into a single *glossa*, usually referred to as the *Glossa* simply. The obvious

Glossa of
Accursius a
continuous
commen-
tary.

¹ "In the *pays du droit coutumier* province differed from province, county from county, municipality from municipality, in the nature of its customs. In the *pays du droit écrit* the stratum of feudal rules which overlay the Roman law was of the most miscellaneous composition." Maine, *Ancient Law*, p. 80.

tendency of this analytical method, which exhausted its productive power in the summing up of Accursius, was to split up legal knowledge into innumerable fragments, through a set of dialectical operations in which the actual text of the *Corpus Juris* was obscured if not entirely superseded by a body of more or less authoritative commentary upon it. Instead of the text, what such jurists considered and discussed were interpretations of it,—interpretations which often became subtle and violent when it became necessary to adapt a system of law then centuries old to widely different conditions. In the form thus given to it by the commentators Roman law became a branch of academical teaching on the founding of the famous universities established on the continent during the fourteenth and fifteenth centuries. The opinions expressed in the *glossa* and those of the post-glossators or commentators, particularly those of Bartolus, came more and more to be placed on a level with the text itself, until it may be said that even down to the sixteenth century the jurisprudence of the later centuries of the Middle Ages was based, in its essentials, on the *glossa* and the writings of Bartolus.¹ The honor of securing the original text of Roman law through the abolition of this *mos Italicus*—which ignored everything like historical criticism in its interpretations of separate passages of the *Corpus Juris* considered as if it were a code of existing law—belongs largely to the Frenchman *Pierre de la Ramée* (1515–1571), with whose name is associated the movement on the part of those jurists who undertook to trace the ideas and principles connecting its various provisions with each other, and to combine them into one rational whole. In France this philosophical movement centered in the university of Bourges, where the new synthetic method was first employed in that kind of academical instruction out of whose success grew the *mos Gallicus*, as

Roman law
as a branch
of academical
teaching.

Glossa of
Bartolus.

Mos
Italicus.

Pierre de
la Ramée.

Mos
Gallicus.

¹ See the excellent Introductory Essay, by Dr. Erwin Grueber to Ledlie's translation of Sohm's *Institutes* from the 4th edition of the German.

Cuiacius
and

Donellus.

The
"French
School."

Triumph
of the
synthetical
method.

Code
Napoléon.

opposed to the *mos Italicus*, or method of the commentators, until then exclusively used. At Bourges it was that Jacobus Cuiacius (1522–1590) developed that phase of the new method which aimed at a thorough understanding of the particular provision of Roman law regarded as a portion of antiquarian research, side by side with Hugo Donellus (1527–1591), who set for himself the synthetical task of understanding law as an organic whole, comprehending and regulating human life in its entirety. The conclusion of his life work in that direction is embodied in his *Commentarii Juris Civilis*,¹ which contains a complete system of Roman private law carefully worked out in its consequences. It thus appears that the new expounders, usually known as the "French School,"² because its most distinguished representatives were of that country, essayed the double task of making the study of Roman law a branch of antiquarian research through an examination of the sources themselves, with the aid of the necessary historical and philological knowledge, and of extracting from the data thus obtained the connected ideas and principles of a great systematic and historical whole as it appears to an understanding untrammelled by scholastic restrictions. Through the efforts of the great French jurists the synthetical method gained universal recognition, and by the end of the sixteenth century it was predominant both in literature and academical teaching.

With the foregoing epitome of the history of legal development in France clearly in view, it will be easier to understand the real nature of the marvelous work of codification made possible by that abrupt and profound break with the past known as the French Revolution. The necessity for such a work grew out of such a terrible complication of laws as had never existed in any other country, a condition prompting

¹ See Stintzing, *Geschichte der deutschen Rechtswissenschaft*, i. 378 sq.

² As opposed to the earlier and later Italian schools, *i.e.* those of the glossators and commentators.

Voltaire's declaration that a traveler in France changed horses not oftener than he changed laws. The effort to work a reformation through the creation of a uniform code began in the Constituent Assembly with dreamers of the Rousseau school, who claimed that it should be "as simple as nature," so plain that any adult person could understand it without any extrinsic aid.¹ Even Cambacérès, chairman of the committee on codification, who devoted himself exclusively to the work, admitted that it was entirely possible to simplify the laws upon an Utopian basis. The outcome of the first attempt was a code reported in August, 1793, as "the fruit of liberty,"—really nothing more than a collection of moral maxims, in fact no code at all. But as even that was considered by the Convention too complex, it was sent back for simplification. Practical work then began in earnest, and after the passing of Robespierre the committee made progress toward a useful compilation of the laws, a task taken over by the Council of Five Hundred and passed on unfinished to the languid government of the Directory. Such was the condition of things when Napoleon came upon the stage in 1799, fully conscious of the prestige to be drawn from the completion of a great work so long delayed. On August 12, 1800, the First Consul appointed a commission headed by Tronchet, and including Portalis, Maleville, and Bigot de Préameneux, to review the work of codification, so far as it had advanced, and to improve on it as much as possible. The draft of the code was finished in four months, an expeditious result only made possible by the previously accumulated materials and devoted labors of the committees directed by Cambacérès, who was not placed on the Code Commission, because as Second Consul it was his duty to preside over the Council of State, whenever the First Consul might be absent. In that body each section

Rousseau's
dream
of a code
"as simple
as nature."

Outcome
of first
attempt.

Commission
of August
12, 1800.

¹ Barère wished to disperse that "flock of judicial ravens, the secret enemies of the Revolution, by destroying their nests."

Napoleon's
personal
agency.

Published
in 1804.

Elements
that entered
into it.

"Code
Napoléon,"
1807.

of the draft code was examined critically during a hundred and two sessions, over fifty-seven of which Napoleon presided in person, taking part in the debates. From Thibaudeau, who was present, we learn that "he regulated and directed the discussion, guided and animated the debate." After a decision was reached as to a particular section by vote, it was printed and copies distributed to all the members. Copies were sent to the judges of the Court of Cassation and to those of the various Courts of Appeal; and these tribunals made their reports to the Council of State. Copies were also sent to the Tribunal, where every article was discussed and returned to the Council of State as adopted, rejected, or amended. The entire work, completed in about four years, was adopted by the legislature and published in 1804, with all the reports and discussions, in the Tribunal and Council of State, showing the original draft and all changes made in it. Thus, out of a prolonged and critical process finally emerged the most famous modern code of substantive law consisting of 2281 sections, arranged under titles and divided into three books, preceded by a preliminary title. It was the final product of the fusion of customary laws, wholly excluding all feudal laws and customs, of royal ordinances and laws of the Revolution, and of the vital principles of Roman private law expressed with the greatest possible clearness and brevity. And here the fact should be emphasized that wherever this code has been reproduced the purely French element has tended to disappear, — it is the element drawn from the private law of Rome that has been and is triumphant. Not until 1807 was the code, known at first simply as the French code, called by legislative authority the "Code Napoléon." Under that title it has encircled the earth as one of the vital forces of modern civilization, asserting as such a greater influence than any similar work since the days of Justinian. While it has suffered important changes both in form and substance, it still remains

virtually the same in principle as it left the hands of its framers. In 1904 the bench and bar of France celebrated the centennial anniversary of its adoption with ceremonies whose literary fruits have been gathered in two ponderous volumes made up of papers prepared by representatives of the many countries that have adopted it.¹ Napoleon made no mistake when he prophesied that he would go down to a very late posterity "with his code in his hand."

Centennial
of 1904.

The revised text of the Custom of Paris of 1580, naturally far more important and authoritative than the Custom of Orleans, the Custom of Normandy, or the Custom of Brittany, was used even in the preparation of the Code Napoléon. It is not therefore strange, when in the seventeenth century France was called upon to provide laws for her colonies in the New World, that it should have been ordained that the general laws, ordinances, and edicts of the realm, and the Custom of Paris should be extended to such colonies. In that way that body of law was replanted in Canada, or New France, and as the French explorers made their way to Detroit, Mackinac, and the Upper Mississippi they took this system with them. In theory at least, the Custom of Paris was in force in Michigan and in Wisconsin, a part of that territory, down to 1810, when the legislature of Michigan, after declaring in substance that it did not know what the Custom of Paris was, abolished it.² When the English conquest of Canada was completed and the entire territory transferred to Great Britain by the treaty of 1763, the grave question arose as to the body of law which should dominate within a region inhabited by French people who had lived for about a century and a half under the

Extension
of French
law to
America.

Custom
of Paris.

Once in
force in
Michigan.

¹ See *Le code civil, 1804-1904*; *Livre du centenaire*. Publié par la société d'études législatives. A. Rousseau, Paris, 1904. And also the excellent article suggested by the event entitled "The Code Napoléon" in *American Law Review*, November and December, 1906, by U. M. Rose.

² *Lorman v. Benson*, 8 Mich. 18, 25; *Coburn v. Harvey*, 18 Wis. 156, 158; Howe, *Studies in the Civil Law*, pp. 134 sq.

Compro-
mise after
Canada
became
English.

Legal
history of
Louisiana.

Territorial
statutes
of 1805.

Rules of in-
terpreta-
tion.

system originally planted, a system partly Roman and partly medieval. The conclusion reached was at once wise and typical of others that were to follow it under like circumstances. English law was introduced in criminal matters,¹ private law in civil matters being left undisturbed. Thus in the Province of Quebec, or Lower Canada, Roman private law, as it was introduced in the seventeenth century, survived; and, in 1866, a civil code, following the general theory of the French code, was promulgated, which is said to be an excellent specimen of juristic work. In that portion of the country lying farther west, and settled by English emigrants, English law naturally became the basis of the social fabric. The legal history of the Province of Quebec was repeated in that of Louisiana, created a dependency of New France, or Canada, in the charter granted in 1712 to the French merchant Crozat² which expressly provided that the laws, edicts, and ordinances of the realm, and the Custom of Paris should be extended to Louisiana. While that system absorbed no doubt some elements from the kindred Spanish system, during the period of Spanish domination (1763–1803),³ Roman private law, as introduced through the charter of Crozat, survived as the basis of private right in the territory of Orleans, created by Congress in 1804, with boundaries substantially the same as those of the present state of Louisiana. By two territorial statutes enacted in 1805, still in force in principle, it was provided that the English common law should be the basis in criminal cases; and, in 1808, the territorial legislature in Orleans adopted a civil code, based to a considerable extent on the Code Napoléon. It is well understood that when a code requires interpretation, resort must be had, first, to the decisions of the Louisiana courts;

¹ By the statutes of 14 Geo. III., c. 83.

² Crozat, then Marquis de Chatel, had leased the country for fifteen years. See Hamilton, *Colonial Mobile*, p. 77 (1898).

³ See Martin, *History of Louisiana* (2d ed., p. 211), as to the time when it is believed that the laws of Spain became the sole guide of the tribunals in their decisions.

second, to the principles of Roman private law, so far as they are applicable to existing conditions.

18. When by the Peace of Westphalia a crowd of petty principalities were recognized as practically independent states, what had been known as the Romano-Germanic Empire really ceased to be such. It became only a Confederation and that of the loosest sort. Its princes, emancipated from imperial control, had become despots in their own territories; its states, of different religions, were governed according to different forms, and administered judicially and financially without regard to each other. Germany had been forced to drink the cup of feudalism to the dregs, and the outcome, as it appeared something more than a century ago, was 300 petty principalities between the Alps and the Baltic, each with its own laws, its own court, its separate coinage, its tolls and customhouses on the frontier. And so against Voltaire's statement that a traveler in France in his time changed horses not oftener than he changed laws, may be set Bryce's statement ¹ that "The traveler in central Germany used, up till 1866, to be amused to find, every hour or two, by the change in the soldiers' uniforms, and in the color of the stripes on the railway fences, that he had passed out of one and into another of its miniature kingdoms." There was thus no central power, either legislative or judicial, like the parliament and king's courts at Westminster, to develop and unify the indigenous German law which grew up in the Middle Ages mainly in the form of municipal, local, and territorial customs, ordinances, and statutes. While enactments not universally obeyed were occasionally made by the sovereign in the German Diet and with its consent, that body, even in the days of its greatest strength, dealt very little with law proper. Therefore, as a great German jurist has expressed it, "When Roman jurisprudence, as contained and set forth in the *Cor-*

Roman
private law
in Germany.

300 petty
principalities.

No central
power to
unify indigenous
German
law.

¹ *The Holy Roman Empire*, p. 330.

pus Juris Civilis, made its way across the Alps, it found, so to speak, an empty and vacant territory, which it was able to occupy forthwith without the slightest resistance. German jurisprudence, in fact, dates from the sixteenth century, *i.e.* its existence commences with, and is due to, the reception of Roman law.”¹ From that time to the present day, it has there guided and determined all juristic thought. The acceptance of Roman law in Germany in such an extensive way as the common law of the country is usually attributed to the universal character and scientific completeness of the system as compared with the insufficiency and clumsiness of the indigenous law; to the notion prevailing at the time that Roman law was the embodiment of the written reason available for the whole world; and to the theory of the continuity of the original Roman Empire and the Holy Roman Empire of the German nation. In disposing of the medieval fancy that Roman law was published by the emperor, and therefore binding on all the countries of Christendom, Herman Conring, in his famous treatise *De origine juris Germanici*, 1643, put beyond all doubt the following position: “(1) The view that the *Corpus Juris Civilis* was ever published in Germany, as a law binding on all the country, is a fable entirely without foundation. (2) On the contrary it was gradually introduced in the fifteenth century, having first been taught at the universities and afterward applied in the courts of justice. (3) It is in force only because it has been received by usage, voluntarily; and, consequently, only to the extent and in the form of such ‘usureception’; in other words, only those provisions of the *Corpus Juris Civilis* are in force which have been actually received by usage, and these provisions only subject to such modifications as have been imposed upon them in actual use.”²

Reception
of Roman
law in
Germany.

Herman
Conring's
demon-
stration.

¹ Sohm, *Institutes*, p. 2.

² See Stintzing, *Geschichte der deutschen Rechtswissenschaft*, ii. 18 sq.; Erwin Greuber, *Introductory Essay to Sohm's Institutes* (Ledlie's trans.), p. xxii. See also Bryce, *Holy Roman Empire*, pp. 369 sq.

After the conclusion had thus been established that Roman law as such was not the law of the country, German jurists of the seventeenth century, by devoting their energies to a study of the law as actually applied through the decisions of the courts, laid the foundation for the development of that system of private law known to us under the name of *usus modernus Pandectarum*. In the systematic expositions made by such jurists every sentence of the written law (the *Corpus Juris*) which was clearly not in use in Germany was excluded, while every proposition of the unwritten law (outside of the *Corpus Juris*) which was actually in use in Germany was included. By dealing in that way with the Roman and German elements which made up the private law actually in force, jurists of the school in question, while following the order of the Digest, expounded, side by side, Roman law as modified by the customs and statutes of the German Empire, and pure German law. A character distinctly national was thus impressed upon the science of law in Germany through the enormous labor devoted to the working out of the *usus modernus Pandectarum*, a labor which emphasized the fact that the common law of Germany is not the pure private law of Rome as laid down in the *Corpus Juris Civilis*, but that law as modified during a long period of development, partly by the mediæval legislation of the church as embodied in the canon law, partly by the customary law of Italy and Germany, and partly by the legislation of the former German Empire. The uncertainties and delays arising out of the application of such an undigested composite in the actual administration of justice stimulated near the beginning of the eighteenth century the growth of the Law of Nature School (*Naturrechtliche Schule*) of jurists who undertook to improve the existing conditions by drawing from the lost code of Nature a lucid system of clear and simple rules. That philosophical school contended that the substance of the law may be evolved at any moment

Roman law as such not law of the country.

Usus Modernus Pandectarum.

What the common law of Germany is.

Law of Nature School.

by the lawgiver from his own inner consciousness, and then imposed arbitrarily in the form of positive legislation on a country irrespective of its state of civilization and past history.

Tendency
toward
codification.

The tendency of that idea, so emphasized by the French jurists of the eighteenth century and countenanced in practice by Bentham, was toward codification. In due time came the code of Bavaria in 1756, of Prussia in 1794, of Austria in 1810. It was as a protest against this demand for codification, and in particular against the extension of the Code Napoléon to Germany, that Savigny published, in 1814, his pamphlet (*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*), in which he expressed an idea, unfamiliar before that time, when he said: "I regard the law of each country as a member of its body, not as a garment merely which has been made to please the fancy, and can be taken off at pleasure and exchanged for another."¹ The central idea of this foremost representative of the Historical School in Germany was that law is an aspect of the total common life of a nation; not something made by the nation as a matter of choice or convention, but, like its manners and language, bound up with its existence. Therefore Savigny summed it all up in the declaration that the people is always the true legislator (*Das Gesetz ist das Organ des Volksrechts*). In the history of jurisprudence his two great works are the *Recht des Besitzes* and the *Beruf unserer Zeit für Gesetzgebung*. Of the former, which marks an epoch, Ihering says: "With the *Recht des Besitzes* was the juridical method of the Romans regained, and modern jurisprudence born." While founding or rather consolidating the Historical School, Savigny wisely emphasized the fact that the practice and theory of jurisprudence cannot be divorced without serious injury to both. The struggle in Germany between the codifiers and

Savigny's
protest.

His two
great works.

¹ As to the literature on this controversy, see Bekker, *Pandektenrecht*, §§ 15, 16; Windscheid, *Pandekten*, §§ 9, 10; Professor Landsberg's article, "Savigny," in the *Allgemeine deutsche Biographie*, xxx. 437 sq.

their opponents ended, for a time, in a drawn battle, the results of which were written upon the face of the land. Modern Germany was divided into two great regions according to the form in which its private law presents itself. Within the territory of the Codified Private Law, embracing almost the entire eastern half of Germany to the right of the Elbe, and the extreme west, to the left of the Rhine, the formal validity of Roman private law was set aside in favor of exhaustive local codes governing the entire private law of the land, codes necessarily constructed on the basis of the law as it previously existed, that is, on the basis of the Pandects. Within the territory of the uncoded Law of the Pandects, also called the territory of the Common Law, embracing one large continuous stretch of country extending from Schleswig-Holstein in the north to Bavaria in the south, Roman private law possessed formal validity and was enforced, except where expressly altered by distinct local legislation.¹

Germany divided into two regions.

Territory of codified private law.

Territory of the Law of the Pandects.

The first step toward the making of the existing American Union was taken when in January, 1786, Virginia issued a call for a convention of states to meet at Annapolis in order to consider the establishment of a uniform commercial system.² The first modern effort to give unity to law in Germany was made, as a prelude to the movement for national unity, by the General Bills of Exchange Law (*Wechselordnung*, 1848-1850), while a general Commercial Code (*Gemeines Handelsgesetzbuch*), enacted in various states between 1862 and 1866, was reenacted for the new Empire in 1871. The preparation of a new general code for the whole German Empire³ began in

First steps toward unity in America and Germany commercial.

¹ Sohm, *Institutes*, pp. 3-4.

² Bancroft, *History of the Constitutions of the United States*, i. 253 sq.

³ When, in December, 1870, sixty-four years after the dissolution of the old Empire, Germany became again a single state in the eyes of Europe, it remained in theory a mere federation. And yet the sovereign legislative power is theoretically unlimited. "It can, by means of constitutional amendment set aside the bounds placed by the constitution between its sphere and that of the individual states, that is, alter them without the consent of the states; it can also with-

General
code for
German
Empire,
1900.
Sohm's
outline.

1874, and the work, practically completed in 1896, was promulgated officially and took effect January 1, 1900. We should be able to look with confidence for an outline of this great code to the famous jurist, Rudolph Sohm, who was a member of the commission that made it.¹ From him we learn that the reëstablishment of the German Empire was essential to the reëstablishment of German law; that that law as now embodied in the Civil Code "is compiled principally from the various provincial codes before mentioned and notably from those of Prussia and Saxony." He had told us long before that "it would be a mistake to suppose that the framers of these codes (the Prussian *Landrecht*, etc.) were suddenly inspired with some new and original wisdom. The codes were, of course, constructed on the basis of the law as it previously existed. Inasmuch, then, as prior to these codes (*i.e.* from the reception of Roman law in the sixteenth century down to the end of the eighteenth century) the law of the Pandects had subsidiary force as law throughout the whole of Germany, these codes must, of course, have been framed more particularly on the basis of the Pandects. The Prussian *Landrecht*, the Saxon and Austrian civil codes contain a large number of legal rules which are directly borrowed from the law of the Pandects (the French civil code contains less Roman law than the others). The study of the Pandect law, then, will supply the necessary clew without which the civil code just referred to can never be fully and thoroughly understood."² That critical statement as to the character of the German provincial

draw from the states the powers reserved to them. In a certain sense, therefore, it may be said that the individual states possess their magisterial rights only by sufferance of the Empire, only by virtue of its will." Laband, *Das Staatsrecht des deutschen Reiches* (Marquardsen's *Handbuch*), p. 22. Amendments originated and acted upon as ordinary laws would be may be defeated, however, by fourteen negative votes in the *Bundesrath*. See Wilson, *The State*, p. 254.

¹ See his article on the general theory and purpose of the code in *The Forum*, October, 1899.

² *Institutes*, p. 5.

codes, especially as to the character of the codes of Prussia and Saxony, from which Mr. Sohm says the present Civil Code was principally and notably compiled, must be kept steadily in view when we read in his more recent article the declaration that "the new Civil Code of Germany is only to a very limited extent Roman in its origin." He certainly could not have intended to say more than that Roman law is no longer the common law of Germany or of any part of that Empire; he could not have intended to say less than that the new Code contains the private law in civil matters, compounded of Roman law and Teutonic customs as modified by experience and legislation during a long period of historical development. Mr. Bryce stated the matter fairly when he said: "This Code, far from being pure Roman law, embodies many rules due to medieval custom (especially custom relating to land rights) modernized to suit modern conditions, and also a great deal of post-medieval legislation."¹ While the *Landesrecht* or "Provincial Law" is expressly annulled, a not inconsiderable number of its enactments remain in force which are, strictly speaking, "agrarian," because designed for the farmer, for agricultural conditions generally, as well as for the protection of vested rights (feudal rights, fcoffments in trust, allodial estates, and copyholds). As the farmer and the merchant are and have been the two great powers in German history, the industrial and agrarian laws that survive may well be compared to the *jus civile*, while the laws of the Civil Code may be said to resemble the Roman *jus gentium*. The merchant has not inaptly been called "the father of the Civil Code of Germany" because, as commercial intercourse recognizes no national boundaries, he was naturally the first to desire a homogeneous system of civil rights. It was the mercantile element in the cities that eventually crushed the spirit of feudalism; it was the mercantile element that opened the way for an

Present Civil Code based on those of Prussia and Saxony.

Bryce's statement.

Farmer and merchant great powers in German history.

Mercantile element crushed feudalism.

¹ *Studies in History and Jurisprudence*, p. 92.

Rules of
construction.

Imperial Code by first creating a uniform system of commercial law. In it the interests of intercourse are primary; exchange is everything. The merchant rules the domain of civil law; the *bona fide* party is the principal personage of it; the protection of *bona fide* acquisition obtains priority over the guardianship of property. No paragraph of the Code can be applied singly; construction and application must be in accord with it as a whole. Above all stands the well-known axiom that true equity is not contained in the letter of the law, but must be read between the lines. The applicability of the several clauses of the Code to special instances is left to the discretion of the judge; the opinion of the courts is superior not only to the words of the contract, but also to the letter of the law. In this rule of interpretation, the capstone of the Code, we have the expanding and adapting power of the praetorian equity in full force.

Roman
private law
in Holland.

19. In Holland, where the antiquarian researches of the "French School" were successfully carried on during the seventeenth and a part of the eighteenth centuries by the so-called "Dutch School," Roman private law won its greatest triumph through the labors of Hugo Grotius (*Huig van Groot*), who extracted from it a set of principles which became the basis of the existing system of international law. The need of a code to regulate their intercourse became pressing when, by the Peace of Westphalia, a crowd of petty principalities were recognized as practically independent states. Such a code¹ Grotius and his successors built up out of Roman private law in its German form, Holland being at that time practically German. No more novel or difficult problem was ever presented for solution than that which confronted the publicists of the sixteenth and seventeenth centuries when they were called upon to furnish rules adequate, by virtue of their intrinsic weight

Grotius
and his
successors.

¹ "That system is, indeed, entirely a German creation, and could have arisen in no country where the law of Rome had not been the fountain of legal ideas and the groundwork of positive codes." Bryce, *Holy Roman Empire*, p. 370.

and dignity, to compel the obedience of the freshly emancipated European nationalities, without the coercive force of any recognized central authority. As imitation is always easier than invention, it is not strange that every mind which attempted to solve the problem should have turned instinctively to Roman jurisprudence as the only source from which the vacuum could be filled. The most enduring outcome of Roman civilization, surviving the wreck of two empires, was Roman law, whose revived study during the twelfth century, in the schools of Italy, Spain, France, and England, caused it to be regarded, in the modern as in the ancient world, as the perfection of human wisdom, the only true and eternal law. A special effort has heretofore been made to draw out in some detail the process through which a particular branch of Roman private law, administered by the *praetor peregrinus* and known as the *jus gentium*, was blended with the Stoic conception of law in the higher sense, as "right reason, pervading all things," and proceeding "from Zeus and the common Nature."¹ Even in Cicero's time the fusion of the *jus gentium* with the *jus naturale* was so complete as to induce him to declare them identical.² In that way the *jus gentium* was clothed with a higher authority, a philosophic dignity which tended to obscure its humble origin as a mere division of private law. To that cause may be attributed the fact that the term *jus gentium* was, in a few exceptional cases,³ used out of its normal and proper sense to indicate a branch of law binding on all

Turned
instinctively
to Roman
jurisprudence.

Fusion of
jus gentium
and *jus*
naturale.

¹ See above, p. 38.

² "Lege naturae, id est gentium," *De Off.* i. 23. For a very careful collection of the authorities regarding *jus naturale* and *jus gentium*, see the work of Dr. Moriz Voigt, *Die Lehre vom Jus Naturale, aequum et bonum und Jus Gentium der Römer*; and also Prof. D. G. Ritchie's *Natural Rights*, Part i. (published in 1895); Sir F. Pollock's article *On the History of the Law of Nature*, *Columbia Law Review*, January, 1901.

³ "Hoc vos Feciales, juris gentibus dicitis?" Liv. ix. II. "Populum Romanum neque recte neque pro bono facturum, si ab jure gentium se prohibuerit." Salust, *Bell. Jug.*, c. xxii. Cf. Professor Nettleship's article on *Jus Gentium* in the *Journal of Philology*, vol. xiii., No. 26.

Holland's
statement.

Maine's
statement.

nations in the direction of their international relations as *jus commune gentibus*. And so it may be true that "there floated also always before the eyes of the later Roman jurists a vision of a '*jus naturale*;' a universal code, from which all particular systems are derived, or to which they all tend, at least, to approximate: a set of rules, the matter or contents of which is of universal application."¹ The effort to give to the blended product of *jus gentium* and *jus naturale* a strained construction was never successful. It was not the extravagant interpretation of Ulpian,² but the more restricted and more reasonable one of Gaius,³ that finally determined its meaning in the time of the Antonines. As Sir Henry Maine has expressed it: "At last, at a peculiarly felicitous conjuncture, Ayala and Grotius were able to obtain for it the enthusiastic assent of Europe, an assent which has been over and over again renewed in every variety of solemn engagement. . . . Having adopted from the Antonine jurisconsults the position that the *jus gentium* and the *jus naturae* were identical, Grotius, with his immediate predecessors and his immediate successors, attributed to the law of nature an authority which would never perhaps have been claimed for it, if 'law of nations' had not in that age been an ambiguous expression. They laid down unreservedly that natural law is the code of states, and thus put in operation a process which has continued almost down to our own day, the process of engrafting on the international system rules which are supposed to have been evolved from the unassisted contemplation of the conception of nature."⁴ As Grotius and his predecessors were well-trained civilians, there is no basis for the assumption that they were befogged as to the true nature of *jus gentium* and *jus naturale* as convertible terms. The fact

¹ Holland, *Elements of Jurisprudence*, p. 6.

² Ulpian's definition of the laws of nature and of nations appears, however, in the Spanish code of *Las Siete Partidas*.

³ *Inst.* i. 1. See also *Just. Inst.* i. 2, § 2.

⁴ *Ancient Law*, pp. 95-96.

that the *jus gentium* was only a branch of Roman private law, and not a system of rules which had been previously applied to the relations of states, was no reason why it should not have been lifted into a higher sphere. Before Grotius appeared upon the scene his Spanish and Italian predecessors had surveyed the whole field,¹—Gentilis in particular having specially emphasized the fact that the *jus naturale* was the highest embodiment of human reason, by which all historical precedents were to be tested, and, if necessary, set aside.² And yet, acute and learned as they were, the predecessors of Grotius were not able to catch the ear of the world. It was his good fortune “to come along behind them and pick up their brains,” and to fuse, through his rare art of exposition, their scattered and fragmentary thoughts into one coherent whole which appealed in due time to all mankind, and thus first awakened the conscience of governments to the Christian sense of international duty. Nothing could be more clear or vivid than Grotius’s definition of natural law as the Antonine jurists had understood it. In his *Prolegomena*³ he declares that “the principles of that law, if you rightly consider, are manifest and self-evident, almost after the same manner as those things are that we perceive with our outward senses, which do not deceive us, if the organs are rightly disposed, and if other things necessary are not wanting.” And in the body of his work he adds: “Natural right is the rule and dictate of right reason, showing the moral deformity or moral necessity there is in any act, according to its suitableness or unsuitableness to a reasonable nature, and consequently, that such an act is either forbid or

Gentilis.

Grotius’s
definition
of natural
law.

¹ As to the works of Oldendorp, Suarez, Victoria, Soto, Ayala, Gentilis, and Winckler, see Taylor, *International Public Law*, §§ 40, 49.

² In 1588 he published at London his *De Jure Belli Commentatio Prima*, upon which Grotius founded his *De Jure Belli ac Pacis* (Paris, 1625). Of Gentilis Grotius says: “Cujus diligentia sicut alios adjuvari posse scio et me adjutum profiteor.” *Proleg.*, § 39. An admirable edition of his work, edited by Mr. Holland, appeared in 1877.

³ *De Jure Belli ac Pacis*, § XL.

Nature as a
lawgiver.

Vagueness
of the
conception.

Alternative
basis resting
on consent
alone.

commanded by God, the author of nature.”¹ One can almost imagine that he hears the great Stoic Chrysippus speaking of the natural law as “the right reason, pervading all things,” and “proceeding from Zeus and the common nature.”² Grotius, following in the footsteps of Suarez and Gentilis, accepted the dominant idea of the age that nature was a lawgiver. His dream was to place her as such upon the vacant imperial throne and to interpret her mandates to nations who would admit no other superior. “The law of nature is,” he says, “so unalterable that God himself cannot change it. For though the power of God be immense, yet may we say that there are some things unto which this infinite power does not extend. . . . For instance, then, as twice two should not be four, God himself cannot affect; so neither can He, that what is intrinsically evil should not be evil.” The practical difficulty inherent in this august conception was its vagueness, the same difficulty that beset Comte’s system of religion, in which Humanity as a concrete conception was exalted to the throne occupied by the Supreme Being under monotheistic systems. Eternal and unalterable as the Grotian law of nature was said to be, it was in fact indeterminable, although in theory it might be assumed to be otherwise. Interpreted by one mind, it meant one thing, by another something quite the opposite. Therefore, without some kind of common consent as to what its precepts were, it was nothing more than a glittering abstraction. Clearly perceiving that difficulty, Grotius very discreetly formulated an alternative basis for the new system which enabled it to rest upon consent alone. Alongside of the law natural, he said, there was a law voluntary whose nature was twofold, divine and human.

¹ *De Jure Belli ac Pacis*, I., c. i., § 10.

² Grotius says in so many words: “And in this sense Chrysippus and the Stoics said that the original of right is to be derived from no other than Jupiter himself; from which word Jupiter it is probable the Latins gave it the name *jus*.” Proleg., § 12.

While the former could never conflict with the law natural, the latter might. This human voluntary law he divided into three parts; first, the law made for the benefit of a single society, the civil law; second, the law of the particular condition; third, the law made for the benefit of all societies, the law of nations.¹ The authority of that law, he said, was derived from the approval of all, or at least of many nations,—the proof of it consisting of continued usage and the testimony of experts. Thus it was that Grotius reached the common-sense basis upon which the law of nations now reposes, the abstract and transcendental foundation embodied in his first postulate having been finally swept away.

Only real
foundation
of interna-
tional law.

20. Having now outlined the history of legal development in those countries in which Roman private law has made its deepest impression, a glance must be taken at those vast outlying regions in which its influence though marked has been less decisive. The statement has been made heretofore that from Constantinople as a nucleus the imperial law extended itself over the Euxine and Balkan countries between the tenth and fifteenth centuries.² Together with Bulgaria, Servia fell under the power of the emperor, and its affairs were for a time managed by a Greek governor. Finally the Servian ruler Stephen Dushan, who divided his kingdom into eight districts and arranged everything on the Byzantine model, conquered the whole of Macedonia and caused himself to be crowned emperor of Servia. He it was who published at a Diet in 1349 his celebrated *Zakonik*, or "Book of Laws," which, as the earliest specimen of Servian legislation, has come down in several manuscripts.³ Roumania is the name officially adopted by the united kingdom that comprises the for-

Roman
private law
in Servia,
Roumania,
and other
countries.

Servia.

Roumania.

¹ *De Jure Belli ac Pacis*, I., c. i., §§ 13, 14, 15.

² See above, p. 147.

³ It was first published by Raich in his *History* at the close of the eighteenth century. Since then other editions have appeared, the most important being those of Miklosich and Novakovich.

mer principalities of Walacia and Moldavia, the name in its native form appearing simply as "Romania," which represents the claim to Roman descent put forward by its inhabitants. The modern law of these principalities, which drew their religion and culture from the Eastern Empire, may be referred to the Roman type, so deeply has its substructure of Slavonic custom been affected by Byzantine influences and by a later knowledge of Roman law drawn from France and Austria. The existing legal system of Greece is based on Roman law, with modifications drawn from France and Bavaria. The Commercial Code is identical with that of France.

Greece.

Russia. Russia, which also derived her religion and culture from the Eastern Empire, has been described as an outlying and half-assimilated province of the legal realm of Rome because its law, originally Slavonic custom, was modified at the outset to some extent by Byzantine influences, and in more recent times by principles regarding property rights and contracts drawn from the Code Napoléon, and to a less degree from the jurisprudence of Germany. In Poland the doctrines of Roman law took rather a deeper hold than in Russia; first, because, as a Catholic country, the influence of the canon law was potent; second, because, lying nearer to Germany, German teaching and German commentaries on Roman law were more accessible.¹ In the same way the customary law of the Scandinavian countries, at the outset purely Teutonic, has been modified by Roman principles derived chiefly through the German universities and German juridical literature. And here it may be added that while the ancient laws of Japan belonged to the Chinese law system, the present laws may on the whole be said to belong to that branch of Roman law which

Poland.

Scandinavian countries.

Japan.

¹ "In Lithuania the rule was that where no express provision could be found governing a case, recourse should be had to the 'Christian laws.' Speaking generally, one may say that it was by and with Christianity that Roman law made its way in the countries to the east of Germany and to the north of the Eastern Empire." Bryce, *Studies in History and Jurisprudence*, p. 93, note 1.

may be called the German system, though they have taken a good deal from the English law system also.¹

21. As prize courts are the outcome of maritime usages that represent the very earliest agreement of civilized nations as to their mutual rights and interests, — antedating by centuries any general understanding as to the principles that should regulate intercourse on land, — their decisions must be justly regarded as the earliest sources of international law, or, as Austin has expressed it, the places where its rules are first found.² And, as it is impossible to understand the position of prize courts as international tribunals without some prior knowledge of the history of the customary laws of the sea out of which their jurisdiction arose, such laws should be mentioned here for the reason that the starting point of them all is to be found no doubt in the rubrics relating to ships and shipping contained in the Roman civil law.³ The mighty forces that finally swept away the Holy Roman Empire as an international power gradually crystallized the elements out of which its successor grew. The Crusades gave an immense impetus to trade, and the Italian cities of Genoa, Pisa, Florence, and Venice, through which flowed the swelling stream of intercourse eastward, rose suddenly into greatness. The new commercial activity thus imparted to the south was rivaled in the north by a movement that drew together about 1260 a few Baltic towns in the Hanseatic League, gradually extended to no less than ninety cities, whose trade found its way to the Mediterranean through the League of the Rhine formed about 1250, and through the Swabian League formed 1376.⁴ The

Roman origin of the "Sea Laws."

Prize courts earliest sources of international law.

Rubrics relating to ships and shipping.

Influence of Crusades on trade.

Hanseatic League.

¹ See Tokichi Masao's article on "The Sources of Ancient Siamese Law," in *Yale Law Journal*, November, 1905.

² *Jurisprudence*, II. 526-528.

³ Especially the rubric *de lege Rhodia de jactu*, quoting and confirming the Rhodian law as to Jettison. *Dig.* 14. 2. There are, however, many other rubrics of the Roman law relating to shipping. See *Dig.* 4. 9; 22. 2; 47. 5, 9.

⁴ Höhlbaum, *Hansisches Urkundenbuch*, I., Nos. 4, 5, 6; Warnkönig, *Flandrische Staats- und Rechtsgeschichte*, I. 315; Cunningham, *Growth of English Industry and Commerce*, i. 138, 141, 146, 174, 184.

Collections
of sea laws.

Laws of
Oléron.

Laws of
Wisbuy.

influence thus exerted by the Crusades upon commerce and commercial unions upon land extended itself in due time to trade upon the sea, and the outcome was the "Sea Laws," a term employed by writers on maritime law in the sixteenth century to designate collections of usages of the sea that had been recognized as having the force of customary law, either through the decrees of a maritime court, or through the resolutions of a congress of merchants and shipmasters. To the first class belong the usages of the mariners of the Atlantic known as the Laws of Oléron, to the second the customs of the mariners of the North Sea and of the Baltic known as the Laws of Wisbuy.¹ It is believed that the judgments of the marine court of Oléron were drawn up as early as the twelfth century; and it is probable that a record of such judgments was brought into England and published as law by Richard I., upon his return from the Holy Land.² At whatever date received such usages and judgments of the sea were entered in the Black Book of the Admiralty as the Laws of Oléron, and thus became "a national code of maritime law for the direction of the admiral; and whatever was defective therein was supplied from that great fountain of jurisprudence, the civil law, which was generally adopted to fill up the chasms that appeared in any of the municipal codes of modern European nations."³ So great was the authority of the Laws of Oléron in most of the Atlantic ports of France that portions of them

¹ As to the causes which brought about the collection of the judgments of the maritime court of Oléron, see Cleirac's introduction to his work *Les Us et Coustumes de la Mer*, first printed at Bordeaux in 1647. As to the sea code of Wisbuy, borrowed in part from the laws of Oléron and Amsterdam, see Hüllman, *Städtewesen des Mittelalters*, i. 182.

² The earliest known text is contained in the *Liber Memorandum* to be found in the archives of the Guildhall of the corporation of London. To the same century belong the judgments of Damm, the port of Bruges, which began to be of importance before the close of the twelfth century. For the old and true text, see Warnkönig, *Flandrische Staats- und Rechtsgeschichte*, I., Appendix, No. XLI.

³ Reeves, *History of English Law*, iii. 389.

were incorporated into that model of marine legislation known as the *Ordonnance de la Marine* of Louis XIV., published in 1681, and expounded less than a century later by Valin in the famous commentary from which English and American jurists and text writers have drawn without stint. The *Ordonnance* of Louis was also enriched from the *Consolato del Mare*, whose authorship is contested by both Spain and Italy. The most probable theory of its origin seems to be that which regards it as a gradual collection of the early maritime customs of the commercial cities of the Mediterranean made between the twelfth and fourteenth centuries.¹ The first edition was that published in the Catalan dialect at Barcelona in 1494 (*Libro del Consulado*),² but by common consent the best is that of Pardessus contained in his *Collection of Maritime Laws*.³ The greatest importance has been attached to its chapters on marine captures in war embodying the leading principles of prize law, in regard to which it has in recent times exercised an important influence.⁴ Of a more comprehensive character than the *Consolato del Mare*, and of a considerably later date, is the *Guidon de la Mer*, drawn up toward the close of the sixteenth century, probably at the instance of the merchants of Rouen.⁵ When the time came for English judges to realize that the doctrines of the common law were not equal to the growing exigencies of English commerce by land and sea, they were not slow to expand their simple code by the introduction of new principles drawn from foreign sources. Foremost in the good work was Lord Mansfield, a well-trained civilian, who, in his

*Ordonnance
de la Marine
of Louis
XIV.*

*Consolato
del Mare.*

*Guidon
de la Mer.*

*Work of
Mansfield.*

¹ Grotius refers to it as containing the constitutions of Spain, France, Cyprus, Syria, the Balearic Isles, Genoa, and Venice.

² Called also *Codigo de las Costumbres Maritimas de Barcelona*.

³ *Collection des Loix Maritimes antérieures au XVIII^e Siècle* (Paris, 1828-1845, 6 vols.), II., c. XII.

⁴ "They agree at present with the maritime code of Europe, notwithstanding many attempts to revise their regulations." Manning, *Law of Nations*, p. 15.

⁵ The second part of Cleirac's work, *Les Us et Coustumes de la Mer* (Bordeaux, 1647), is devoted to *Le Guidon*.

opinion in the case of *Luke v. Lyde*,¹ involving the important question of freight, *pro rata*, cites the laws of Rhodes, the Digest, the *Consolato del Mare*, the Laws of Oléron and of Wisbuy, Roccus, *De Navibus et Naulo*, and the Marine Ordinance of Louis XIV.

¹ 2 Burr 882. Roccus, a Neapolitan lawyer, published a large work on maritime law in 1655, from which was compiled a smaller work in Amsterdam in 1708, entitled *De Navibus et Naulo*.

CHAPTER IV

EXTERNAL HISTORY OF ENGLISH LAW

1. In the preceding chapter the fact was emphasized that the public law of Rome, constitutional and administrative, was rejected because inapplicable to the new conditions that arose when the state system of modern Europe, in which the state as a nation is the unit, swept away and superseded the ancient state system in which the city commonwealth had been the unit. What did survive was the private civil law of family and property, of contract and tort, based on principles of natural equity and universal reason which have not lost their force with the altered circumstances of more recent times. That body of Roman private law, which seems to be clothed with a kind of immortality, and which has asserted a wider influence upon civilization than any other force except Christianity, appears in a far smaller proportion in the Code than in the human, heathen Digest which embodies the science of life as it existed at Rome before the social fabric was affected by Christian influences. The growing importance of English public law and its rapid extension throughout the world certainly gives reasonable foundation for the belief that it is destined to take on the same kind of immortality. The political systems of all the Teutonic nations, as they appear to us when written history begins, contained the germs of the representative principle, and in every one of the modern European states that have arisen out of the settlements made by the Teutonic nations on Roman soil a serious attempt has at some time been made in the direction of representative

Growing
importance
of English
public law.

Roman
private and

English
public law
contrasted.

government. The remarkable fact is that in every continental state in which such an attempt was made it ended at last in failure and disappointment. With the close of the Middle Ages every effort that had been made in the direction of representative government upon the Continent of Europe was brought to an end.¹ Then it was that the free constitutions of Castile and Aragon were overthrown by Charles V. and Philip II.; then it was that the States-General of France met for the last time (1614) before their final meeting (1787) upon the eve of the French Revolution.² In England only among the Teutonic nations did the representative system survive; in England only has the representative principle — which has been called “a Teutonic invention”³ — been able to maintain a continuous existence. In that way the English nation has been able to hand down the representative principle from the barbarian epoch to modern times; in that way England has become the “mother of parliaments,” the teacher of the science of representative government to all the world. Since the beginning of the French Revolution nearly all the states of Continental Europe have organized national assemblies after the model of the English Parliament in a spirit of conscious imitation. But the typical English national assembly, embodying what is generally known as the bicameral system, was not copied into the Continental European constitutions until it had first been reproduced in a modified form and popularized by the founders of the federal republic

In England only did representative system survive.

First reproduced and popularized in the United States.

¹ “In the fourth period, on the Continent, all efforts towards a representative system have failed or almost entirely disappeared; pure monarchy prevails. England alone decidedly obtains a constitutional government. This epoch lasts from the sixteenth century to the French Revolution.” Guizot, *History of Representative Government*, p. 258; see also p. 15.

² See Robertson, *Charles V.* iii. 434; Watson, *Philip II.* iii. 223; Prescott, *Philip II.*, first chapter of book vi., Sismondi, xiii, 342; Macaulay, *Hist. of Eng.* i, 46–48.

³ “It is the great political invention of Teutonic Europe, the one form of political life to which neither Thucydides, Aristotle, nor Polybius ever saw more than the faintest approach.” Freeman, *History of Federal Government*, i. 67.

of the United States. In the several colonial commonwealths founded by English settlers upon American soil, the typical English national assembly reappeared in an embryonic form as the predestined product of a natural process of reproduction. These assemblies "were not formally instituted, but grew up by themselves, because it was in the nature of Englishmen to assemble."¹ A graphic statement of that fact may be found in the words of a writer upon American colonial history who tells us that in "this year (1619) a House of Burgesses broke out in Virginia."² When the colonial commonwealths in America severed the tie of political dependence which bound them to the mother country, and rose to the full stature of sovereign states, they, with a single exception, organized their several legislatures after the ancient model as it existed in the insular system. And the framers of the federal constitution of 1787, abandoning the original idea of a federal assembly consisting of a single chamber, adopted the English system of two chambers in the form in which that system had reappeared in the several states.³ Thus rendered popular by its successful reproduction in American constitutions, state and federal, "the British political model was followed by France, by Spain and Portugal, and by Holland and Belgium, combined in the kingdom of the Netherlands; and, after a long interval, by Germany, Italy, and Austria,"⁴ and finally by Japan. To these must be added the reproductions on a vast scale which have been made by the republics of Mexico, Central and South America, where, in some instances, single states approach very closely, so far as their constitutional law is concerned, to the English original as modified by American innovations, and, in others, federal states are organized

Then
reproduced
in Conti-
nental
Europe,
Japan,

Mexico,
Central and
South
America.

¹ Seeley, *The Expansion of England*, p. 67.

² These are the words of Hutchinson quoted by Professor Seeley, *Ibid.*, p. 67.

³ See Taylor, *The Origin and Growth of the English Constitution* (8th ed.), i. 44, 45, 71.

⁴ Sir Henry Maine, *Popular Government*, p. 13.

Secret of its
enduring
power.

on the American plan with certain reservations. The English constitutional system thus stands forth as the accepted model of popular government throughout the civilized world. When an attempt is made to ascertain the secret of its enduring power, it is to be found in the fact that the primitive Teutonic fabric, planted in the practically unincumbered soil of an island world, took such deep root and matured so perfectly before it was transferred to other lands that it has been able to survive all the mutations through which it has passed. The system of archaic law transferred to Britain by a group of Teutonic tribes, between the middle of the fifth century and the end of the sixth, has never ceased to exist. It has passed through a long process of change and of growth, it has taken on many new forms, it has borne great fruit, it has controlled the destinies of a nation, "which, while reforming in all directions, has destroyed nothing; which has preserved both its trees and its constitution; which has lopped off the dead branches without leveling the trunk; which alone, in our days, among all nations, is in the enjoyment not only of the present but the past."¹ It is, however, to the public law of England that such observations must be limited, because England cannot fairly be said to have an indigenous system of private law all her own, enriched as it has been, in all of its vital parts, from Roman sources. In the effort now to be made to outline the unbroken development of English public law as a system, the growth of private law will be noticed only so far as it may be inseparably connected with the main subject. Except in states which have written constitutions, it is difficult to make an exact delimitation of the province of law that should be called constitutional. It is difficult to unfold the growth of Parliament without mentioning the law of land tenure; "the liberty of the subject" can only be defined by references to civil and criminal procedure,

English
private law
enriched
from
Roman
sources.

¹ Taine, *History of English Literature*, ii. 517.

involving trial by jury. Without attempting to establish a scientific frontier, an honest effort will be made not to encroach upon the field of English private law except where it cannot be severed from public. Some encroachments must, of course, be made at certain turning points at which it will be necessary to explain how the entire fabric of English law was profoundly affected by successive waves of Roman influence that broke upon it from without.

Only English public law to be outlined.

2. In the preface the statement has been made that Kemble, rejecting every suggestion of Roman influence at the outset, was the first clearly to perceive the all-important fact, now generally admitted, that the national life of the English people, both natural and political, began with the coming of the Teutonic invaders who, during the fifth and sixth centuries, transferred from the Continent into Britain their entire scheme of barbaric life. The beginnings of the English constitution thus become a part of the brief history of the childhood of the whole Teutonic race as contained in those terse sketches of the ancient freedom drawn by Caesar and Tacitus.¹ That homogeneous race, although possessed of a common system of social and political institutions, was nevertheless broken up into an endless number of political communities or states, which stood to each other in complete political isolation, except when united in temporary confederacies. In their general descriptions of the German people, both Caesar and Tacitus had constantly in mind the existence of these disconnected states into which the race as a whole was subdivided,² and which each termed the *civitas*, with the explanation that what was true of the race in one state was true of the race in all the states, excepting, perhaps, the few particulars in which the monarchical states differed from the non-monarchical. The primary bond that united the people of

Teutonic origin of English institutions.

Sketches of Caesar and Tacitus.

The *civitas* and its subdivisions.

¹ *De Bello Gallico*, vi. 23; *Germania*, cc. 8, 10, 12, 13, 14, 15, 19, 25, 30, 41.

² *Ibid.*

a *civitas* was a personal one; the king was the head of the race, the first among the people, and not the king of a particular region or area of territory. The largest division of such a state is usually designated in Latin *pagus*; in German, *gau* or *gá*; in Old English, *scir* or *shire*,¹ terms that finally gave way on the Continent to the word "hundred." The hundreds were subdivided into village communities, the *vici* of Tacitus, who says that Teutonic society embraced four ranks or classes: the nobles, simple freemen, freedmen, and slaves.² Teutonic society as a whole rested on two fundamental conceptions: distinctions of rank and the possession of land. The Germans dwelt either in villages, *vici*, with a series of connected buildings, every homestead having a vacant space of ground about it, or apart from villages in isolated homesteads, wherever a grove, meadow, or spring happened to attract them.³ In a famous passage, which has given rise to much learned controversy, Tacitus thus describes the German method of agriculture: "The fields are alternately occupied by the whole body of cultivators according to their number, and these they afterward divide among themselves according to their individual dignity."⁴ The extent of the waste lands rendered this method of partition easy: "They changed the arable land from year to year, and there is land to spare."⁵ The *vicus* represents the Teutonic form of the village community, and constitutes an important link in the chain of its history. The portion of territory occupied by the community of kindred cultivators is termed in the German muniments the "mark,"—something marked out and

Distinctions of rank and possession of land.

Village community as the mark.

¹ Kemble, *Saxons in England*, i. 72; *Essays in Anglo-Saxon Law*, p. 5.

² *Germania*, cc. 7, 24, 25.

³ *Ibid.*, c. 16; Waitz, *Deutsche Verfassungsgeschichte*, i. 108.

⁴ There are two readings of this very difficult passage. See G. L. von Maurer, *Einleitung*, pp. 5, 6; Stubbs, *Select Charters*, p. 59.

⁵ "Arva per annos mutant, et superest ager." *Germania*, c. 26. "It implies no more than this, that within the mark, which was the property of all, what was this year one man's corn-land, might the next be another man's fallow." Kemble, *Saxons in England*, i. 40.

defined, and having settled boundaries. The mark might be located either in the forest or in the plain, according to the nature of the country in which the kindred chanced to fix their settlement; and its border land, according to circumstances, consisted either of wood or waste.¹ The mark was divided into three parts, — the village, the arable lands, and the common or waste lands. In the center of the mark was situated the village in which the markmen dwelt in their homesteads, surrounded by their inclosures and out-buildings. Within the precinct of the family dwelling-place the head of the family was supreme. No one had the right to enter there except himself and those under his paternal authority. It could not be invaded even by officers of the law.² The possession of such a homestead was evidence of the fact that its possessor was a fully qualified member of the mark, and as such entitled to a full share in the enjoyment of the arable, the pasture, the meadow, and waste lands belonging to the community.³ The arable land embraced within the mark was usually divided into three great fields, and it was so arranged that, in the rotation of crops, each field could lie fallow once in three years.⁴ In the fields under cultivation in any given year, every householder had allotted to him his equal share which he cultivated separately by his own labor, together with that of his sons and slaves. But he was required to cultivate according to fixed rules; he was obliged to sow the same crop with the rest of the community and to allow his portion of the uncultivated field to lie fallow with the rest. The rules regulating this system of cultivation were both minute and complicated. The woods, pastures, and meadows embraced within the mark were undivided, and enjoyed in

¹ Konrad Maurer, in *Kritische Ueberschau*, i. 67–72.

² Maine, *Village Communities*, p. 78.

³ G. L. v. Maurer, *Dorfverfassung*, i. 61–65.

⁴ Cf. Laveleye, *Primitive Property*, p. 110, as to the time of the introduction of this triennial rotation of crops.

The mark
moot.

common, and, originally, without restriction.¹ In the mark moot was transacted all the business that arose out of the system of common cultivation, and out of the enjoyment of common rights. The annual allotment of the arable lands, the rotation of crops, the choice of the meadow, the admission of a new member into the mark, were all questions determined in the mark moot.²

The
hundred
and the
hundred
court.

By the union of two or more marks was formed the *pagus*, *gau*, or *shire*, known in later times as the hundred, — a word which, in some form, enters into all of the Germanic constitutions. When the written history of the primitive Teutonic state begins, the formative period has ended; the state is an existing organization, occupying definite geographical limits, while the original units out of whose aggregation it arose have descended to the status of mere divisions and subdivisions. Connected in that way with the occupation of definite areas of land, these divisions and subdivisions represent forms of organization not only personal but territorial. The hundred court, like all other Teutonic courts, was a popular assembly, composed of all the freemen resident within the district. In this court was administered regularly and frequently the customary law.³ It met, perhaps, once a month, and, in addition to its judicial duties, it discharged many administrative functions. In the state assembly a chief was chosen to act as magistrate in each hundred. He presided in the hundred court and with him were associated a hundred companions or assistants, chosen from the body of the people, who attended to give their advice and to strengthen the hands of justice. As by the union of two or more marks the hundred

¹ G. L. von Maurer, *Markenverfassung*, p. 142.

² G. L. von Maurer, *Einleitung*, pp. 141-150.

³ "The hundred, and the principle that the hundred community is a judicial body, outlived the storms of the folk wanderings, the political creations of Clovis, the reforms of Charlemagne, the dissolution of the Frankish Empire, the dissolution of the county system." Sohm, *Die fränkische Reichs- und Gerichtsverfassung*, i. 541.

was formed, so by the union of two or more hundreds the state was formed. The supreme powers of the state were vested in a state assembly, in which every freeman had his place. The character of this assembly and the methods of its procedure are described in the *Germania* with some detail. In the assembly of the hundred the people met in council, mainly for the purpose of judicial administration; in the state assembly they met together mainly for the purpose of political action. In the deliberation of the assembled people every man had an equal voice; and it was the custom for all to appear fully armed. The state assembly met at fixed and stated intervals, unless sooner called together by some sudden emergency. When the people had assembled in sufficient numbers the business began after silence had first been proclaimed by the priests, who possessed the coercive power to enforce it. The business presented to the consideration of the assembly was all prepared beforehand by a permanent council composed of the magistrates, *principes*, who decided all minor questions, reserving only the graver ones for the consideration of the whole people. The debate was opened by the king or a chief, and then the rest were heard in turn, according to age, nobility of descent, renown in war, or fame for eloquence. No one could dictate to the assembly,—all could persuade, no one could command. When a proposition was put forward to which the people were opposed, they expressed their dissent in loud murmurs; when it pleased them, they approved by the clash of arms. Here the magistrates were chosen to administer justice in the marks and hundreds — *pagos vicosque*.¹ In the state assembly, as a high court of justice, accusations were exhibited and capital offenses prosecuted.² Those guilty of treason and desertion were hanged; those guilty of cowardice and unnatural vices were suffocated in the mud. All other offenses could be atoned for by fines,

The
state
assembly.

Permanent
council of
principes.

A high
court of
justice.

¹ Tac. *Germania*, cc. 11, 12.

² Sohm, *loc. cit.*, p. 5.

a part of which was paid to the king or state, and a part to the person injured or to his family. Tacitus makes it clear that each state had its own constitution and that they were all substantially the same in every particular except one, — in some of the states kingship prevailed, in others it did not.¹

States,
monarchical
and non-
monarchical.

In the monarchical states the kings were chosen from among those of noble blood, while the generals, *duces*, were chosen from among those who possessed the greatest military fame. The power of the king was neither arbitrary nor unlimited, while the general commanded more by exhibitions of valor than by positive authority. In the non-monarchical states the conception of national unity was embodied solely in the idea of the *civitas*, working through the state assembly and through the magistrates chosen by it for local administration.

Military or-
ganization.

So closely did the scheme of military organization, common to all the Teutonic tribes, resemble the system of political organization upon which the state was constituted, that a comparison has happily been made between the state in its territorial aspect and the army in permanent encampment.² In the social and political order the narrowest form of local organization was represented by the kindred grouped together in village communities. In one of the elements of which the army was composed the same principle of cohesion appeared. The mass of the people fought together in "families and affinities";³ in these groups of kindred appeared upon the battlefield the village communities. The larger divisions of the state were also distinctly represented. Each *pagus* or hundred contributed its quota of a hundred warriors to the host. These warriors, chosen from the flower of the youth, constituted the infantry, which was looked upon as the basis of the national strength.⁴ The third element of the army consisted of bands of professional warriors, united to a leader

"Families
and
affinities."

Hun-
dreds.

¹ Tac. *Germania*, cc. 7, 12, 25.

² Stubbs, *Constitutional History*, i. 31.

³ Tac. *Germania*, c. 7.

⁴ *Ibid.*, c. 6.

of their choice in a close and peculiar relation. The leader of such a band was the *princeps*; his warlike followers, the *comites*. The clanship, or *comitatus*, thus formed had its divisions of rank fixed by the *princeps*. In peace and war the *comites* were required to serve the *princeps* even to the death, and in turn the *princeps* shared his spoils with them and gave them bread.¹ In the structure of the *comitatus* was embedded the germ of a great aftergrowth. The relation of lord and vassal, the first outcome of the *comitatus*, was purely a personal one. But in the process of time, when the lord makes a grant of land to his vassal in consideration of past services; and upon further consideration that the vassal will hold such land upon the tenure of military service, a new relation becomes involved with the old one. When the two relations become inseparably welded together, the result is feudalism.² The host was thus composed of three distinct elements: the main body of the people fighting in groups united by the tie of kinship, the chosen infantry contributed by the hundreds, and the bands of mounted warriors, each under the leadership of its own trusted chief. When the whole people were in arms we have "popular assembly, parliament, law court, and army in one."³ The close relationship thus existing between the systems of political and military organization is, in one respect, worthy of special consideration. It is easy to understand how an army of invasion, composed either of the whole people of a state or of a single subdivision, embodied in its very organization the primitive political system, which it would naturally reproduce, in whole or in part, wherever a settlement was made in conquered territory. If the expedition happened to be composed of a single group of kindred, upon a settlement being made in a new land its members would

The
comitatus.

Lord and
vassal.

Feudalism.

Reproduction of institutions in conquered territory.

¹ *Ibid.*, cc. 13, 14. See Kemble's chapter (vii.) on "The Noble by Service," *Saxons in England*, i. 162.

² Freeman, *Norman Conquest*, i. 58-63.

³ *Essays in Anglo-Saxon Law*, p. 8.

naturally draw together upon the old plan in a village community.¹ If the expedition happened to be composed of many groups, united under a common leadership, a cluster of village communities would as naturally result. After the units of organization had thus been reproduced and brought into contact through the ordinary law of federation, first the hundred and last the state would reappear. In Britain the village community or mark is represented by the township;² the *pagus*, *gá*, or early shire, by a group of townships united in the district known in later times as the hundred; while a union of *pagi* or *gás* is the primitive *rice* or kingdom. The political structure of the primitive kingdom would therefore be the same, whether it arose out of the settlement of a single conquering host or out of the gradual coalescence of smaller settlements originally isolated and independent. It is all-important for the student of English constitutional history firmly to grasp the process through which the *civitas* of Caesar and Tacitus reappeared in Britain as the primitive *rice* or kingdom. At the time Tacitus wrote the typical Teutonic tribe (*civitas*) was a distinct commonwealth, the largest and highest political aggregate. Not until nearly a hundred years later were these scattered tribes gathered into larger wholes, — into nations.³

Primitive
rice or
kingdom.

Repro-
duction of
civitas of
Caesar and
Tacitus.

Period of
Teutonic
conquest
and dimness
of its
history.

3. During the century and a half that intervened between the middle of the fifth century and the end of the sixth the Teutonic settlements in Britain were made. Within that

¹ "And as they fought side by side on the field, so they dwelled side by side on the soil. Harling abode by Harling, and Billing by Billing; and each 'wick' or 'ham' or 'stead' or 'tun' took its name from the kinsmen who dwelled together in it." Green, *History of the English People*, i. 10.

² John Mitchell Kemble, in his chapter on "The Mark" (*Saxons in England*, 2 vols., 1849), was the first to apply to English institutions the fruits of German research on the relations of early land tenure and settlement. His treatment of the subject has since received a further application in the masterly histories of G. L. von Maurer and Waitz, whose conclusions have been utilized and expanded by Stubbs and Freeman.

³ Zeuss, *Die Deutschen und die Nachbarstämme*, pp. 303, 304.

period the whole island, south of the firths of Ford and Clyde, passed from the possession of the native race to that of the conquerors, with the serious exception of a broad and almost continuous strip of country extending along the entire western coast, and embracing North and West Wales, Cumbria, and Strathclyde. Within that area the entire native or Welsh population withdrew, with whatever of civilization, religion, or law they had derived from Rome. In that part of the land the conquerors made their own, they planted the entire fabric of Teutonic life — social, political, and heathen — which they had brought with them in their blood and bone from the fatherland. “While the Germans of Gaul, Italy, and Spain became Romans, the Saxons retained their language, their genius, and manners, and created in Britain a Germany outside of Germany.”¹ The invaders, who thus established a new nationality, were of the purest Teutonic type, and all spoke dialects of the Low German. Thus transplanted into Britain the history of the English race begins with a century and a half of unbroken heathenism. In its traditions we possess a record of their earliest thoughts and feelings, and in these we discover the sources of their proud self-consciousness, their love of liberty and strife, their heroism, and their power.² Out of the fusion of the Teutonic settlements, made within the limits and during the period to which we have referred, has grown the English nation; out of the fusion of the dialects spoken in those settlements has grown the English language; out of the primitive political institutions embedded in those settlements has grown the English constitution. It is therefore impossible to exaggerate the historic importance of this period of conquest and settlement, — it is the start-

“A Germany
outside of
Germany.”

Language
and institu-
tions
Teutonic.

¹ Taine, *History of English Literature*, i. 50.

² “The primary characteristic of this old Northland mythology I find to be impersonation of the visible workings of nature. . . . What we now lecture on as science, they wondered at and fell down in awe before as religion.” Carlyle, *Heroes and Hero-Worship*, p. 16.

ing point of everything. Its importance, however, is fully equaled by its obscurity. A period of historic darkness and legend intervenes between the overthrow of what had been the Roman province and the beginning of the new Teutonic society. And the difficulties which thus arise are greatly increased by the further fact that such light as we do possess concerning the period that follows is of the dimmest and most uncertain character. How to bridge this chasm, dividing the old from the new, is the most difficult problem in English history. The first step in its solution was taken when, in the preceding section, an examination was made of the primitive Teutonic constitution as it appeared in the homeland at the end of the first century. It was, however, three centuries and a half after that time before the migrations into Britain began. While it is impossible to determine just what amount of development took place in the interval, there is no reason to suppose, in the light of the later evidence, that any material advance was made in the direction of civilization. As to the history of the conquest itself, the written evidence consists of a few scanty and uncertain fragments. Upon the part of the conquered we have only the *Historia* and *Epistola* of Gildas, really a single work, written probably about the year 560.¹ Upon the part of the conquerors we have, in the opening of the invaluable compilation generally known as the English Chronicle, much that is valuable in regard to the conquests of Kent, Sussex, and Wessex, intermixed, no doubt, with much that is mythical.² As to the conquests of Mid Britain, or the eastern coast, there is no written account from either side; while the fragment from the *Annals of Northum-*

Chasm that
divides old
from the
new.

History
of the
conquest
itself.

¹ See Stubbs and Haddan, *Councils of Britain*, i. 44; Skene, *Celtic Scotland*, i. 116 n.

² As to the historic value of the traditional account of the English conquest of Britain, as contained in the English Chronicle, see Freeman, *Norman Conquest*, i. 7, and Dr. Guest, *Early English Settlements*, in Salisbury volume of the *Transactions of the Archaeological Institute*.

bria, embodied in the later compilation which bears the name of Nennius, alone throws light upon the conquest of the North. There is neither record nor tradition to guide us as to the manner in which the country was parceled out among the conquerors; and only by the aid of local nomenclature, and by the surviving traces of the older life embedded in the customary law, can be determined the forms in which the first settlements were made upon the conquered soil. But at the moment when the period of conquests ends, Christianity begins, and from its introduction the committing of the customary law to writing appears to have begun.¹ Of the existing laws, those of Aethelberht, Hlothere and Eadric, Wihtred, Ine, Eadward the Elder, Aethelstan, Eadmund, and Eadgar are mainly in the nature of amendments of custom; while those of Aelfred, Aethelred, Cnut, and those which bear the name of Eadward the Confessor, aspire to the character of codes.² Just before the middle of the eighth century we have the Ecclesiastical History of Baeda, from which is derived the only substantial account of the century and a half which followed the coming of Augustine. To these imperfect records have been added the fruits of the most careful and exhaustive archaeological and geographical research. Even the physical conformation of the conquered territory has been minutely examined as one of the surest of documents bearing upon the history of the conquest itself.³

Forms of
first settle-
ments.

Early laws.

Baeda's
history.

Period of
settlement.

The period of piratical visitation — which began when the freebooters from the north appeared in the Channel as mere plunderers who simply came to harry the coast and then to sail away again — gave way about the middle of the fifth

¹ The promulgation of the laws of Aethelberht took place at some time between the coming of Augustine in 596 and his death in 605. Baeda says these laws were enacted "*cum consilio sapientium.*" *Hist. Eccl.* ii. 5.

² *Select Charters*, p. 60; Thorpe, *Ancient Laws and Institutes of the Anglo-Saxons*.

³ Cf. Works of Dr. Guest, contained in the volumes of *Transactions of the Archaeological Institute*, and Green, *Making of England*.

century to a period of conquest and settlement. For a century and a half after that time the coming of the Teutonic tribes into Britain assumed the form of a migration. All the evidence tends to show that the emigrants came in disconnected bands, more or less numerous, each under its own leader or ealdorman, who singled out some particular section of country for conquest and settlement. The fact that the invaders were compelled to cross the sea in ships, capable of transporting only small bodies of men, precludes the idea of invading hordes by which the whole land could be suddenly overrun. The weakness of the attack, and the fierceness with which it was resisted, were the dominant causes that determined the character of the conquest itself. By dint of hard fighting, bit by bit, district by district, the land was won. As we may happen to accept one or the other of the two leading theories that exist as to the manner in which the land was originally distributed, the conclusion may be reached either that the invaders divided the land according to fixed rules as they advanced or that, after the first period of struggle was over, a rearrangement took place according to established forms. No matter which theory be the true one, as to the broader aspects of the distribution, the fact remains that the invaders did settle down upon the land in marks or village communities, and did possess it according to the principles of ownership which that system represented.¹ The Teutonic host not only embodied within itself all the elements of political life, but its very organization presented the most natural scheme of allotment upon which a division of the land could be made. The clans of kindred warriors represented the village communities; the hundreds of warriors, the *pagi* or *gás*; while

Bit by bit
the land
was won.

Elements
of political
life in the
host.

¹ To Kemble belongs the credit of being the first to apply the results of German research into the mark system to the history of English institutions. See ch. ii. on "The Mark," and ch. iii. on "The Ga or Seir," *Saxons in England*, vol. i. See also Morier, *Essay on Land Tenure* (Macmillan, 1870); Nasse's treatise, *On the Agricultural Community of the Middle Ages*, Ouvrey's trans. (Macmillan, 1871); Digby, *Law of Real Property*, pp. 4-8.

the host as a whole was in fact the state assembly, not in council but in action,—the whole people in arms. When, therefore, the conquering host settled down upon a definite area of land, the state reappeared as a necessary consequence. Or it may have been that the invaders often came in numbers only sufficient to constitute a single group, or even one village community. Out of the union of such communities arose *gás* or shires, which finally became organized into states or kingdoms. In Britain the village community or mark is represented by the township;¹ the *pagus*, *gá*, or shire, by a group of townships united in the district known in later times as the hundred;² while a union of *pagi* or *gás* is the primitive *rice* or kingdom. The political structure of the primitive state would therefore be the same whether it arose out of the settlement of a single conquering host or out of the gradual coalescence of smaller settlements originally isolated and independent.

Township
and
hundred.

4. Before the historic period begins the petty states or kingdoms into which the settlers originally grouped themselves had ceased to exist as independent communities; they had become bound up in the larger aggregates generally known as the heptarchic kingdoms. It is possible, however, from that condition of things to reason back and to determine with reasonable certainty the structure of these early kingdoms before the process of aggregation began. The later evidence justifies the assumption, which will be adhered to throughout, that these early or primitive kingdoms were reproductions, in every material particular, of the Continental Teutonic states,—the *civitates* of Caesar and Tacitus.³ In

Primitive
and
heptarchic
kingdoms.

Early
kingdom
reproduc-
tion of
civitas.

¹ Maine, *Village Communities*, p. 10.

² "From the first the township or village community must have been regarded as forming a part of the larger aggregate, the hundred." Digby, *Law of Real Property*, p. 7. That aggregate was the early shire and later hundred. *Essays in Anglo-Saxon Law*, p. 19.

³ "The *civitas* or *populus* of Tacitus, the union of several *pagi*, is in Anglo-Saxon history the *rice* or kingdom." Stubbs, *Constitutional History*, i. 119.

tun moot as in mark moot the assembled villages met to regulate their own local and agricultural concerns; in the *gemot* or meeting of all the freemen resident within the *pagus* or early shire, we have in fact, if not in name, the hundred court of the Continent; while the primitive state assembly is the folk moot, the meeting of the whole people in arms. By adhering firmly to this conception of the structure of the petty states, or early kingdoms, as they will be called, into which the conquerors originally grouped themselves, it will be possible hereafter the more clearly to explain the historical origin and structure of the various divisions and subdivisions which appear in the composition of the consolidated kingdom of England after the work of aggregation has been finally accomplished.

Romano-British life passed away within certain limits.

The whole fabric of the new society, which completely displaced within certain limits the older Celtic society, was purely Teutonic. Its language was made up of a set of dialects of the Low German; the only religion which it possessed was the religion of Woden; its only conception of law and government was a purely Teutonic conception. The witness of language, of religion, and of law all point to the one irresistible conclusion, that within the limits which the conquerors made their own while they were still heathen the whole fabric of Romano-British life passed away.¹ And this conclusion is greatly strengthened by the fate of the Roman cities. The German instinct was averse to dwelling within the confines of walled cities; in the woods and in the plain the German made his home; his boundaries were the boundaries of the mark; his walls, the mound and quick-set hedge by which his "tun" or village was surrounded. The abandoned Roman cities went to ruin and decay, and with them perished the system of municipal life which they embodied. In the

Fate of Roman cities.

¹ "The proofs of such a displacement lie less in isolated passages from chronicle or history than in the broad features of the conquest itself." Green, *Making of England*, p. 132.

course of time, it is true, the sites of many of these deserted cities were reoccupied by the conquerors; but the new system of municipal life which they established had no connection with the old,—it was simply the “tun” or village life in a higher state of organization.¹ But it will not suffice for us simply to examine the broader aspects of the new society; we must descend to details, and examine the specific forms in which the older life reappears when the work of conquest is done.

Teutonic
municipal
organiza-
tion.

The political and social life of the founders in the fatherland rested upon two fundamental conceptions, — distinctions of rank and the possession of land, — two cardinal ideas which are fully developed in the life of the village communities when Teutonic history begins. The original basis of land ownership was freedom; the freeman alone could possess family land² within the village; and upon this possession, the badge of his freedom, depended his right to participate in the enjoyment of the common lands, the property of the whole community.³ The free were divided into two classes, — nobles and simple freemen; while the unfree consisted of agrarian dependents, who occupied their masters' lands upon the basis of a fixed contribution, and of slaves whose condition represented the full measure of servitude.⁴ In the settlements made by the kindred warriors in Britain, the primitive divisions of rank distinctly reappear. In Old-English phrase the noble is the *eorl*, the simple freeman the *ceorl*; while beneath *eorl* and *ceorl* stand the unfree, representing different degrees of servitude. The *ceorl* in the new society is the basis of the village life, just as the simple freemen was the basis in the older society. He is the “*waepned man*,” the

Distinctions
of rank and
possession
of land.

Free
and unfree.

Ceorl.

¹ As to the lack of continuity in Britain of Roman municipal institutions, see Kemble, *Saxons in England*, vol. ii., ch. vii., “The Towns.”

² For a definition of family land, see *Essays in Anglo-Saxon Law*, p. 68.

³ G. L. von Maurer, *Markenverfassung*, pp. 50–62; *Dorfverfassung*, pp. 61–65; *Einleitung*, pp. 72 *et seq.*

⁴ Tac. *Germania*, cc. 7, 24, 25.

"free-necked man," whose neck has never been bent by a master. Within the village community he possesses the "ethel" or "alod,"¹ which entitles him to the enjoyment of all rights to which any other free member of the community is entitled. But in the host and in the assembly he is simply a unit with no distinction of birth to lift him above his fellows.

Eolas. In the new life as in the old, the *eolas* or *aethelings* are the highest order of freemen, distinguished above the rest of their class by reason of their noble blood and by the possession of large estates.² The *eolas*, the nobles of the first settlements, and their descendants represent the ancient nobility of immemorial descent as distinguished from the later nobility by service. The unfree among the settlers in Britain may

Laets. be grouped in two broad divisions, — *laets* and slaves. The *laet* was a dependent cultivator, whose dependence resulted from the fact that he was a landless man; he had no share in the land of the community; he was the cultivator of the land of another. As to the lord whose land he tilled he was unfree, but, save as against him, his life and limb were as secure as the ceorl's. He had his own house and home, and the lord could not take from him the land he tilled as long as he paid his rent in labor or in kind, and performed such other services as were due to his lord. But he could leave neither land nor lord at his will; and, as he owned no land in the village community, he had originally no part or place in its political life.³

Slaves. Below the *laets* were the slaves, whose condition represented the full measure of servitude, — a servitude as abject as the slavery described in the *Germania*. Slavery might result from one of many causes, and was either *casu* or *natura*. The lowest condition of slavery was represented by the *theow*,

¹ The terms "ethel" or "alod" are usually employed to describe land held in full ownership. Konrad Maurer, *Kritische Ueberschau*, i. 97; *Saxons in England*, i. 88, "The ethel, hid, or alod."

² Green, *Making of England*, p. 174.

³ See *Essays in Anglo-Saxon Law*, p. 86.

who was either *wealh* — that is, of British extraction — or of the Teutonic stock, and a descendant of the slaves of the first settlers. The *wite-theow* was the man who could not pay his debts, or who had lost his freedom through crime, and whose kindred would not make up the fine for him. The *esne* served either for hire or for land, and may have been a little better off than the *theow*. Then there were the men who, compelled by famine, "bowed their heads for meat in the evil days."¹ But no matter what the cause from which the slavery may have resulted, in contemplation of law the slave was the mere chattel of his lord, a part of his stock, for whose wrongdoing he answered as for the mischief done by his cattle. The slave had no legal rights, no wergild, no credibility as a witness, and a wrong done to him was only an offense against his master. At his death his status descended to his children; and even the children of a freeman by a slave mother were slaves according to the old English proverb, "Mine is the calf that is born of my cow." But the dictates of humanity secured to the slaves some rights which the theory of the law denied him. His two loaves a day and his holidays were secured to him, and out of his savings, which in theory at least belonged to his master, he was allowed to purchase his own freedom and that of his children.² The primitive Teutonic village community in Britain represented, therefore, a settlement made up of eorls and ceorls, with their unfree dependents, who stood, in relation to their lords, in different degrees of servitude. The political power of such a community was embodied in the village moot, in which the land-owning freemen met together and passed all laws, or rather by-laws, necessary for the ordering of their village and agricultural life. The title to the territory of the free community

No legal
rights, no
werbild.

Practice
kinder
than theory.

Village life
as a whole.

¹ That form of involuntary servitude was sanctioned by the church. Cf. Theodore, *Penitential*; Stubbs and Haddan, *Councils*, iii. 202.

² Kemble, *Codex Diplomaticus*, meceli. and deccccxxiv.

Homestead
and its
incidents.

as a whole was vested in the community itself; while within it each villager possessed his homestead and the right to a definite portion of arable land, which entitled him to the enjoyment of all common rights. With this conception of the primitive free community clearly before us, it will be possible to trace with more distinctness the development of an institution which grew up alongside of and at last overshadowed the miniature democracy. But in order fully to grasp the nature of this institution and its development, an examination must be made into the nature of the new kingship to which the migration and conquest gave birth.

Growth of
the new
kingship.

From the *Germania* we learn that in the fatherland kingship prevailed in some of the states, while in others it did not.¹ That kingship did not prevail among the Saxons is affirmatively stated in Baeda;² and the highest authorities agree in the inference that the other tribes that joined in the migration did not differ from the Saxons in that respect.³ Every band of invaders, great or small, that came to engage in the work of conquest was necessarily obliged to trust its fortunes to some leader or chieftain of its choice. According to the Chronicle, the chieftains who led the first expeditions into Britain bore no higher title than heretoga or ealdorman.

Invading
tribes non-
monarchical

Heretoga or
ealdorman.

In 449 A.D. the Jutish war bands landed under the command of two heretogas, Hengist and Horsa, and in 455 A.D. Horsa was slain, and Hengist and Aesc, his son, obtained the kingdom. In 495 A.D. two ealdormen came to Britain, Cerdic and Cynric his son; and in 519 A.D. they became the kings of the West Saxons. The evidence justifies the conclusion that each expedition was led by a chosen chieftain, who might bear as a civil ruler the title of ealdorman, while as war leader he

¹ Tac. *Germania*, cc. 7, 12, 25.

² *Hist. Eccl.* v. 10. "Non enim habent regem iidem Antiqui Saxones, sed satrapas plurimos suae genti praepositos."

³ Royalty among the conquerors of Britain was one of the results of the migration. Freeman, *Norman Conquest*, i. 51.

might bear the title of heretoga. But as the conquest advanced, and as definite districts of country were permanently secured, and as the various groups of conquerors within such districts felt the need of drawing together under a permanent instead of a temporary leadership, the ealdorman was advanced to the dignity of a king who could represent in his person the unity of a new national life. In this wise a brood of petty kings grew up that continued to survive for centuries. In order to attach the idea of permanency to the new kingship, the name of the son was often associated with that of the father as a recognition of the hereditary principle; while, in order to impart sanctity to the person of the new king, fable at once traced his descent in an unbroken line from Woden. This recognition of the hereditary principle was attended and modified, however, by the older principle of election.¹ The right to the throne might be vested by the original choice in one royal house, but the question as to which member of that house should receive the succession when a vacancy occurred, was one the national assembly alone could determine. For centuries the right to reject the immediate heir of the last king, in favor of some other member of the same house more competent to govern, was freely exercised. How far the power and dignity of a king exceeded that of an ealdorman, it is difficult to determine; but it is quite clear that the title of king did carry with it an advance in both respects. It is probable that the king was not chosen until a group of war bands, each under its own ealdorman, had united in the formation of a kingdom. In that way the king was advanced to the supreme command and to national authority, while the ealdorman descended to the status of a subordinate, although still possessing the highest command in his own district.

Ealdorman
becomes
king.

Blending of
the heredi-
tary with
the elective
principle.

Ealdorman
as head
of district.

¹ "The elective principle is the safeguard of their freedom; the monarchical principle is the condition of their nationality." Kemble, *Saxons in England*, i. 137.

Tribal
sovereignty.

The fact must be constantly borne in mind that the new king was the king of a nation, the leader of his people, the head of the race, and not the king of a country and lord of the soil. The idea of territorial as distinguished from tribal sovereignty was the growth of later times.¹ In war the king, as leader of the host, possessed supreme command, while in peace his powers were coördinate with the national assembly, with whose concurrence he performed all important acts. He maintained not his own peace, but the national peace, and executed justice on the breakers of it; but justice was not yet the king's justice: it was the justice of the village, the hundred, and the folk, in whose moots was vested jurisdiction. As the process of aggregation advanced, as the early kingdoms became bound up in the seven or eight heptarchic kingdoms, which finally united under the rule of one royal house, the institution of kingship grew with each expansion of territory. As an heptarchic king rose in power and importance above the petty royal head of a primitive state, so did the king of all the English rise in power and importance above an heptarchic king. In the process of aggregation was thus involved the growth of kingship, and in the growth of kingship were involved all the elements of constitutional life.

Dignity of
kingship
grew as the
process of
aggregation
advanced.

The
comitatus.

Reference has heretofore been made to the structure of the *comitatus*, the personal following of professional warriors who grouped themselves around a king or chief in a strange relation of fidelity and dependence that rendered them a class apart from the body of the people. Each chieftain by whom a war band was led to the conquest of Britain came attended by his *comites*, and their fortunes advanced together. In return for their fidelity and service the *comites* expected

¹ "Territorial sovereignty — the view which connects sovereignty with a limited portion of the earth's surface — was distinctively an offshoot, though a tardy one of feudalism." Maine, *Ancient Law*, p. 102. See also *Early History of Institutions*, p. 73.

to receive from their chief whatever of bounty lay in his power to bestow; but it was a part of his absolute duty to supply them from his own board with their daily bread. The chief therefore becomes in Old English the *hlaford*, the loaf giver, a term which, by an entire departure from its original meaning, finally softened down into the modern form of lord; while the *comes*, the *hlafaeta*, the loaf eater, becomes the *gesith*, *gesith*, or companion. Under these names the old relations at first appear. The right upon the part of the king to maintain a body of *gesiths* or household retainers has been called a very jewel in the crown; but this right was not confined to kings alone, it was enjoyed alike by all the great men of the nation.¹ As kingship advanced in power and privilege, kings were able, of course, to confer upon their dependents a status and emoluments such as no one else could bestow. And as the king grew in power and importance the companion or *gesith* soon changed his original title for a new one that more clearly expressed his somewhat changed relation. He became the *thegn* or servant instead of the companion of his lord. In this way originated a new nobility by service, which grew and widened until it at last absorbed and superseded the older nobility of blood. The ancient *eorl* passed away and the *thegn* took his place. The status of the *thegn* materially depended upon the status of his lord. As a king stood above *ealdorman* or bishop, so stood the king's *thegns* above their *thegns*. The king, as the representative of the race, conferred upon his following, at once bodyguard and council, not only dignity and importance, but substantial benefits. As no one could judge a king's *thegn* but his lord, the royal following became exempt from the jurisdiction of the popular tribunals. The greatest

The *hlaford*
or loaf
giver.

The *gesith*
or com-
panion.

The
thegnhood
or nobility
by service.

¹ "The difference between the *comites* of the *princeps* and the household of the private man depends fundamentally only on the public and political position of the master." Stubbs, *Constitutional History*, i. 149, 150.

Thegnhood
grew into
central
institution
of the state.

boon, however, which such a thegn expected his lord to bestow, was a grant of land out of the public domain, which the king had the power to make with the consent of the witan.¹ Upon estates created in this way the thegns began to dwell, and thus ceased to be members of their master's household. And so the thegnhood grew into a territorial nobility,² into the central institution of the state. And so heavily did this institution, involving the relation of lord and man, press upon the whole social and political fabric, that it finally became a settled principle that every man should have a lord to act as his protector and surety; the lordless man became almost an outlaw. But depressing as the institution of thegnhood may have been to the simple freeman as a class, it led in the end to the firm establishment of a liberal principle of advancement that has lingered at the root of English society. The ceorl could not become an eorl for the simple reason that "a man cannot change his forefathers." The thegnhood, however, rested upon more elastic principles; it was not an hereditary caste, but an aristocratic class, whose ranks were ever open to members from the class beneath it. The ceorl who had so thriven as to acquire five hides of land, or who had been sufficiently successful as a merchant, could become a thegn.³

Ranks ever
open to class
beneath it.

Relation of
lord and
man.

Represented
but one
element of
feudalism.

The most important outcome of the *comitatus*, from which arose this new nobility by service, was the relation of lord and man, — a relation at first purely personal, and not necessarily connected with the holding of the land.⁴ This relation, therefore, represented but one element of feudalism, which implied not only the mutual relation of trust and fidelity

¹ Baeda complains that in his day so much of the folkland was bestowed upon pseudo-monasteries that there was no place where sons of nobles or veteran warriors could receive a grant. *Epist. ad Ecgbirhtum Archiepiscopum*, § 11.

² As to the growth of Frank feudalism, see Waitz, *loc. cit.* ii. 262.

³ Creasy, *The English Constitution*, p. 42.

⁴ Digby, *Law of Real Property*, p. 21.

between lord and vassal, but along with it the holding of land by the tenure of military service due from the vassal or tenant to the lord as lord of the fief. From the earliest times in England — as soon, no doubt, as the idea of a nation as an organized political community had become fully developed — the obligation of military service for the protection of the state was imposed upon the holding of all land by freemen as a necessary burden. This obligation, which no landholder could escape, was embodied in the inevitable *trinoda necessitas*, which consisted of service in the field and in the repair of bridges and fortresses.¹ But this service was due from the citizen to the state or from the subject to the sovereign, and not from a vassal to his lord. The two great elements of feudalism — the relation of lord and man, and the holding of land by military service — were thus embedded in an embryonic form in English institutions from the very beginning. But these elements never became inseparably welded together into a definite and harmonious system until after the Norman conquest.² Not until after that event did the relation of lord and man fully develop into the technical relation of lord and tenant.³

*Trinoda
necessitas.*

Feudalism
in embryo.

While the development of Germany advanced in the path of political consolidation, that of England advanced in the path of political confederation. The course of this development is broken into two distinct and well-defined epochs: the first, embracing the drawing together of the early kingdoms into the seven or eight aggregates generally known as the heptarchic states; the second, the drawing together of the heptarchic states into the one united kingdom of all the

Early
kingdoms
long
preserved
folk moots

¹ "This common burden was the *trinoda necessitas*, in its origin required of all people, and not resting on land, and therefore not the subject of immunity." *Essays in Anglo-Saxon Law*, p. 61.

² Freeman, *Norman Conquest*, i. 63.

³ See Digby on the "Development of the Idea of Tenure," *Law of Real Property*, p. 37.

and tribal
kings.

English under the house of Cerdic. It will not be necessary for the present to look beyond the first period, during which the early kingdoms coalesced in the formation of the heptarchic states. In the structure of these larger aggregates one fact of paramount importance stands prominently forth, and that is that the early kingdoms descend in status without a sacrifice of their autonomy; they preserve their ancient boundaries, their national assemblies or folk moots, and their tribal kings. The kingdom of the Mercians in Mid Britain seems to have been a mere confederacy, which resulted from a gradual union of smaller states, whose kings during the early days still continued to exist. In the same way Wessex consisted of a union of kindred states, each having its own ealdorman or under king. From the Chronicle we learn that five West Saxon kings appeared at one time in a single battle.¹ East Anglia was made up of two settlements, the North and South Folk, whose names are still preserved in the shires of Norfolk and Suffolk, into which the kingdom was finally divided. Kent, like East Anglia, was probably composed of two tribal divisions originally distinct; and in the eighth century it broke up into the kingdoms of East and West Kentings, probably upon the lines of the earlier states.² And only after a long period of struggle did Bernicia and Deira finally unite in the kingdom of Northumbria.³

Heptarchic
kingdoms
and the
witenage-
mot.

Such being the principle upon which the early kingdoms coalesced in the formation of the heptarchic states, the question naturally arises as to the form and structure of the national assemblies of these aggregated states. The primitive Teutonic conception of an assembly, whether local or national, rested upon one simple idea, and that was that every free-

¹ *E. Chron.* a. 626.

² "It is probable that from the earliest times Kent had at least two kings, whose capitals were respectively Canterbury and Rochester, the seat of the two bishoprics." Kemble, *Saxons in England*, i. 148.

³ See Green, *Making of England*, ch. vi.

man resident within a state or district had the right to appear and represent himself in the assembly or court of such state or district. In the composition of the assemblies of the early kingdoms there was no departure from primitive traditions. The townsmen met in tun moot, the freemen of the shire in shire moot, while the whole people composed the state assembly or folk moot. And even after the early kingdoms had become bound up in larger aggregates, they still firmly adhered to the original principle, so far as the composition of their own assemblies was concerned, without extending it to the national assemblies of the aggregated states. That is to say, if the right of all the people to attend in the assemblies of the aggregated or heptarchic states continued to exist in theory, it was not exercised in fact. The national assembly of an heptarchic state was not a folk moot, but a witenagemot; it was not a great tumultuary assembly composed of the whole body of the people, but a small assembly composed of the great and wise men of the land, who met as councilors of the king. The only consistent theory upon which this changed condition of things can be explained is, that as the process of aggregation advanced the limits of the greater kingdoms so widened as to render a general attendance both irksome and difficult, and for this reason the mass of the people simply ceased to attend.¹ In that way assemblies purely democratic in theory, without the formal exclusion of any class, shrank up into assemblies purely aristocratic. The representative principle existed, it is true, in the lower ranges of organization,² but the idea had not yet sufficiently developed to be employed in national concerns. The time had not yet come for the early kingdoms

Heptarchic national assemblies shrink up into purely aristocratic bodies.

Representative principles not involved.

¹ That is the theory of Kemble as developed in his chapter (vi.) on the Witenagemot, *Saxons in England*, vol. ii., and as restated by Freeman, *Norman Conquest*, i. 67-71, and Appendix 2, *Comparative Politics*, p. 232.

² In the representation of the townships in the courts of the hundred and the shire.

which afterward became shires to send representatives to a national parliament, — that principle was destined to be the growth of later times. Such was the origin and history of the witenagemot, whether considered as a national assembly of an heptarchic state or as the national assembly of all the English when finally united under the house of Cerdic.

Growth of
national
unity.

Kingdoms
of Northern,
Central, and
Southern
Britain.

Threefold
division
only broken
down after
struggle of
two cen-
turies.

5. When written history first reveals to us through the pages of Baeda the form which the new society in Britain had assumed, the seven or eight aggregates, generally known as the heptarchic states, were even then manifesting a tendency to group themselves in three great masses, soon to be known as the kingdoms of Northern, Central, and Southern Britain.¹ The limits of the northern kingdom, the realm of the Northumbrians, stretched from the Humber to the Forth. The southern kingdom of the West Saxons extended from the line of Watling Street to the coast of the Channel. Between the two lay the kingdom of Mid Britain, destined to become most powerful under the leadership of the Mercian kings. When Aethelfrith in 593 became king of Northumbria, it is probable that this threefold division was clearly established. How to destroy it so as to unite the whole English nation under the rule of a single overlord, was a problem that required for its solution a period of more than two hundred years. During that period two forces, widely different in character, were constantly working in the same direction, and through their joint efforts national unity was at last attained. These two forces were the church and the sword. The organizing and centralizing power of the one made possible the enduring triumph of the other. The Teutonic conquest of Britain differed in two material particulars from all other Teutonic conquests made within the limits of the Roman Empire. In every other province the conquerors gradually accepted both the language and the

¹ Green, *Making of England*, p. 299 n.

religion of the conquered. In Britain they accepted neither; there they clung with tenacity to their native speech and to their Aesir faith. A sullen spirit of national hate seems to have forbidden any attempt upon the part of the British Christians to preach the gospel to their heathen neighbors. For a century and a half after the conquest began the invaders of Britain remained heathen. By the intervention of this unbroken barrier of English heathendom the Celtic Christians were entirely isolated and cut off from the continental churches of the West. In order to break that barrier, so as to bring Britain once more within the domain of the Christian world, Gregory sent forth a band of missionaries to reconquer for Rome what the legions had given up.¹ In 597 Augustine landed on the shores of Kent, and four years later he received a letter from Rome marking out a plan of ecclesiastical organization designed to embrace the whole island.² In that scheme London and York, which had been the principal cities of Roman Britain, were designated as the centers of two archbishoprics, to each of which were to be annexed twelve suffragan sees. But after a struggle of more than thirty years Latin Christianity accomplished nothing permanent outside of Kent. The spiritual conquest of the north was to be achieved by preachers who were to come from an outpost of the Celtic church established in the Isle of Hii or Iona, off the west coast of Scotland. Through their fiery missionary zeal the standard of Woden was forced to yield to the standard of Christ, a result which precipitated the question whether the English nation as a whole should accept Christianity in its Celtic or its Latin form. In the Synod of Whitby, called in 664, it was settled that the nascent English church should not attempt by opposing Rome to fight against the world.³

Conversion
and growth
of unity in
national
church.

Latin
Christianity
and its
conquests.

Synod of
Whitby,
664.

Although each one of the heptarchic kingdoms was Chris-

¹ Baeda, *Hist. Eccl.* i. 2, 5, 26.

² *Ibid.* i. 29.

³ *Ibid.* iii. 25, 26.

Organi-
zation of
English
Church by
Theodore.

Arrived in
Kent in 669.

First arch-
bishop of
entire
church.

tianized from a distinct source, the general aspects of the missionary work were everywhere the same. The conversion of the king generally preceded the acceptance of the faith upon the part of his people, whereupon the missionary bishop became the royal chaplain and the kingdom itself his diocese.¹ In that way the heptarchic divisions of the country reappeared in the earliest forms of organization which the church assumed. But it was no part of the plan of Rome to permit the bishoprics thus established to remain long in a state of isolation. In 669 Theodore of Tarsus, appointed by Pope Vitalian to the vacant see of Canterbury, arrived in Kent² with the specific purpose of organizing the English church so that it could be brought into definite relations with the see of Rome. At the coming of Augustine, seventy-two years before, the division of the heathen English into the three kingdoms of Northern, Central, and Southern Britain was already clearly defined. Theodore upon his arrival found the political condition of the country substantially unchanged. But spiritually a great change had taken place, — the heathen English had become Christians. It was possible, therefore, for Theodore as primate to deal with the English nation as a whole. The first three years that followed his coming he passed in visiting all parts of the island, and he was everywhere received with welcome and reverence. "He was the first of the archbishops whom the whole English church consented to obey."³ After settling all personal disputes among the bishops, Theodore assembled them, together with their leading clergy, in a council which was held at Hertford in 673.⁴ By the decrees of this council

¹ "The princes being apparently desirous of attaching a Christian prelate to their *comitatus*, in place of the Pagan high-priest who had probably occupied a similar position." *Saxons in England*, ii. 360.

² Baeda, *Hist. Eccl.* iv. 1.

³ "Isque primus erat in archiepiscopis, cui omnis Anglorum Ecclesia manus dare consentiret." Baeda, *Hist. Eccl.* iv. 2.

⁴ *Ibid.* iv. 5.

each bishop with his clergy was restricted to his own diocese, and, what was far more important, it was ordained that the episcopate should meet annually in council at Clovesho.¹ Soon after the meeting of the council of Hertford, Theodore entered upon the execution of his plans for the permanent organization of the church, which involved an increase in the episcopate and a breaking up of the great dioceses into smaller sees. The last part of the work was carried out by a falling back upon the older tribal boundaries which the English settlers were so careful to preserve. The see of East Anglia was broken up into the dioceses of the North Folk and the South Folk,² while Mercia and Northumbria were divided in the same way.³ Wessex alone of the larger kingdoms resisted; but a few years after Theodore's death it yielded, and the whole nation was then grouped in sixteen sees, subject to the metropolitan primacy of Canterbury. Within a short time afterwards this arrangement was so modified as to allow to York the position of an archbishopric, with three suffragan sees. By the final subdivision of Wessex, under Eadward the Elder, the plan of Theodore was at last carried out, and the territorial organization of the dioceses as then fixed has remained, with a few minor changes, to the present day.

Theodore
breaks up
the great
dioceses.

Primacy of
Canterbury.

Work
completed
under Ead-
ward the
Elder.

Through the results of the work of Theodore the disunited English people found it possible, for the first time, to draw together in obedience to a recognized central authority. A people who had never yet been able to realize a sense of political unity under the sway of a single overlord were now able to realize a sense of ecclesiastical unity under the metropolitan primacy of a truly national church. Representative men from every part of the English nation had never yet

Unity of
church
foreshadows
unity of
state.

¹ Stubbs and Haddan, *Councils*, iii. 118-122.

² Baeda, *Hist. Eccl.* iv. 5.

³ As to the division of Mercia, see Stubbs and Haddan, *Councils*, iii. 127-130; as to the work in Northumbria, Eddi, *Life of Wulfred*, c. 24.

assembled in a single witenagemot for the purpose of political legislation. But the existence of such an assembly was now clearly foreshadowed in the annual meetings of the episcopate for the purpose of ecclesiastical legislation. The early councils of the church were the first national gatherings in which the English nation was ever represented as a whole. The infant church thus became the nursery of a national spirit which finally ripened into a complete sense of national consciousness. The unity of the church led the way to the unity of the state, as the national councils of the church led the way to national witenagemots.

Church
councils
first
national
gatherings.

Northumbria's
struggle for
supremacy.

While the church was thus paving the way for national unity the three great kingdoms of Northern, Central, and Southern Britain attempted, each in its turn, to solve the problem of so extending its supremacy over all the rest as to bring the English nation as a whole under the sway of its own royal house. The initial effort was made by Northumbria under Eadwine,¹ its first bretwalda, who extended his supremacy over all the English kingdoms except Kent, to whose royal house he became allied in 625.² The predominance of Northumbria really ends in 659 with the revival of the Mercian power under Wulfhere. After that event Northumbria abandoned the struggle for supremacy to Mercia and Wessex.³ Early in the eighth century the Christian Mercians appear as a great power in Mid Britain under the leadership of Aethelbald, who overran the whole of Wessex during a war which seems to have terminated in 733.⁴ For twenty years after that event the overlordship of Mercia was recognized by all the English south of the Humber. While the power of Offa, who succeeded Aethelbald in 758,

Mercia's
struggle.

¹ *E. Chron.* a. 617. At that time, after the battle of the Idler, Eadwine ascended the Northumbrian throne.

² By a marriage with the Christian princess Aethelburh. Baeda, *Hist. Eccl.* ii. 9.

³ Green, *Making of England*, p. 298.

⁴ *E. Chron.* a. 733.

rose high enough to tempt him to aspire to a correspondence upon equal terms with Charles the Great, he was never able to establish an overlordship over either of the rival kingdoms of Northumbria and Wessex.¹ To the latter, which grew out of a small settlement made on the coast of Hampshire by an invading host led by the ealdormen, Cerdic and Cynric,² was to come the final victory. The first enemy to be conquered was the Welsh from whom the Severn valley was won by the battle of Deorham in 577.³ Not, however, until early in the ninth century did the last of the Britons in Cornwall bow to the West Saxon supremacy. In 815 Egberht marched into the heart of Cornwall, and after a struggle of eight years the power of the Cornish Britons was broken and the supremacy of Wessex extended to the Land's End.⁴ With all internal dissensions hushed beneath the sway of Egberht, and with all fear of attack from the Welsh finally dispelled, the West Saxons, whose unity as a people had never been broken, were now ready to assume the leadership of the English nation. First Mercia and then Northumbria was forced to yield. Thus after two centuries of struggle, in which the greatest kings of Northumbria and Mercia had failed, Egberht, the eighth and last of the bretwaldas, brought about a forced union of all the English kingdoms under the sway of the house of Cerdic. In the hour of victory the king of the West Saxons ventured, for once at least, to style himself king of the English.⁵

Wessex's
struggle.

Egberht's
triumph.

¹ The Mercian supremacy was broken by the West Saxons in 754 upon the field of Burford. *E. Chron.* a. 752. From 752 to 849 (from the death of Baeda to the reign of Aethelwulf), the entries of the English Chronicle are wrong by two years. See Stubbs, *Roger of Hoveden*, preface to i. lxxxix. *Rolls Series*.

² They were advanced to the dignity of kings of the West Saxons. *E. Chron.* a. 519.

³ *E. Chron.* a. 577. See Guest, "Conquest of the Severn Valley," *Archaeological Journal*, xix. 194.

⁴ *E. Chron.* a. 823 (825).

⁵ "Egberhtus gratiâ Dei Rex Anglorum." *Codex Diplomaticus Aevi Saxonici*, i. 287.

From
Ecgerht to
Eadgar
(829-958).

Danish
invasions.

Aelfred and
the Danes.

Peace of
Wedmore,
878.

The
Danelagh.

Through the conquests of Ecgerht all the Teutonic states in Britain became mere dependencies of Wessex, as under kingdoms, ruled either by their own royal lines or by some prince of the house of Cerdic. Not, however, until after a century and a half had passed by did these loosely united states become incorporated as integral parts of one consolidated kingdom. The history of that process of consolidation is inseparably connected with the Danish invasions, whose pressure had begun to be felt even before the work of union had been finally accomplished. The Chronicle tells us that in 855 the heathen men wintered for the first time in the isle of Sheppy. From that time to the end of the ninth century the Danes, who now came in large bodies, seriously engaged in the work of conquest and permanent settlement. In the reign of Aethelred the First (866-871) the full force of Danish invasion broke upon the loosely united realm which his grandfather Ecgerht had built up.¹ In 878 so overwhelming was the force of the invasion that Aelfred, who had succeeded Aethelred, was obliged to hide as a fugitive in the marches of Somerset; and for a time it seemed as if the standard of Woden had triumphed alike over the Dragon of Wessex and the standard of Christ. But, after a great victory won by Aelfred in the same year, the invaders entered into a solemn peace at Wedmore, whereby all Northumbria, all East Anglia, all Central England east of a line stretching from Thames' mouth along the Lea to Bedford, thence along the Ouse to Watling Street and by Watling Street to Chester, was left subject to the Northmen.² Within this Danelagh, which embraced more than one half of the empire of Ecgerht, the Danes settled down among the conquered English as lords of the soil. The customary law that grew up within the Danelagh, the name applied to

¹ As to the conquest of Northumbria, the first to yield, see Robertson, *Scotland under the Early Kings*, ii. 430.

² See Aelfred and Guthrum's Peace in Thorpe, *Laws and Institutes*, i. 152.

the region in which Danish law prevailed, varied only in small particulars from English customary law; new names rather than new customs date from the Danish occupation. Aelfred, at his death in 901,¹ left the Danes in quiet possession of the whole district ceded to them by the Peace of Wedmore; the task of reconquering the Danelagh he transmitted to his children. While it may be said that Aethelstan completed the conquest of the Danelagh by incorporating Northumbria as an integral part of the realm, the reigns of his successors continued to be disturbed by revolts in the north, until the final extinction of the Northumbrian kings. Not until the death of the last Danish king of Northumbria in 954 did the phantom of provincial royalty pass forever away. From that time forth the great realm of the north was governed by an earl or ealdorman appointed by the national king. When Eadwig died in 958² the kingdom, after a brief division, was reunited under Eadgar the Peaceful, whose tranquil reign of seventeen years constitutes the most glorious period in the history of the West Saxon Empire. The death of Eadwig and the final extinction of all provincial royalty paved the way for Eadgar's accession to the threefold sovereignty of the West Saxons, Mercians, and Northumbrians.³ Engle, Saxon, and Dane were united under his sway; he became the sole and immediate king of all the English, and in his time the name of Britain passed into that of Englalund, the land of Englishmen. The growth of a real national unity was now complete; the consolidated kingdom of England was made not only in fact but in name.

Extinction
of provin-
cial royalty.

Eadgar the
Peaceful.

Sole and
immediate
king of all
the English.

6. The growth of the consolidated kingdom of England embraces three distinct periods: the union of the primitive states in heptarchic kingdoms; the forced union of the heptarchic kingdoms under the supremacy of Wessex; the

Constitution
of the
consolidated
kingdom.

¹ *E. Chron.* a. 901.

² *Ibid.* a. 958.

³ See Robertson, *Historical Essays*, pp. 203-216.

period of consolidation which, beginning with Ecgberht, ends with Eadgar. With the history of that process the growth of the shire system is inseparably interlaced. The scir or shire was simply what the word implies, — a division of a larger whole; and it is now maintained, with greater or less emphasis, that scir or shire was the term originally employed in Britain to describe the district that arose out of a union of townships. But the early shire, which thus represented the largest division of the primitive states, must not be confounded with the modern shire, which represents the largest division of the consolidated kingdom. With the triumph of Ecgberht begins the work of consolidation which occupies nearly a century and a half in its completion. In that process local kingship became extinct, and the primitive states are finally incorporated with Wessex—they cease to exist as states and become shires. And as the primitive states thus descend in status, their own shires necessarily descend in the same way, — they cease to be shires and become hundreds. Thus it may be assumed, as a general principle, “*that the state of the seventh century became the shire of the tenth, while the shire of the seventh century became the hundred of the tenth.*”¹ The use of the word “shire” in the enlarged and modern sense seems to have been introduced during or shortly after the reign of Ecgberht; but the name of the hundred does not occur until the laws of Eadgar,² in whose time the arrangement of the whole kingdom in shires was probably completed. The map of the England of to-day clearly discloses the origin of the modern shire in what has been called the primitive state. Out of the principalities founded by the Somersaetas, the Dorsaetas, the Wilsaetas, the Middle Saxons, the East Saxons, the South Folk, the North Folk, have grown

Early shire
not to be
confounded
with
modern.

Modern
shire iden-
tical with
primitive
state.

Historical
origin of
certain
modern
shires.

¹ See Essay upon the “Anglo-Saxon Courts of Law,” by Mr. Henry Adams in *Essays in Anglo-Saxon Law*, p. 19.

² Eadgar, i. Constitutio de hundredis.

the shires of Somerset, Dorset, Wilts, Middlesex, Essex, Suffolk, and Norfolk. Hampshire, Berkshire, and Devonshire are equally ancient, being mentioned in the Chronicle as shires as far back as the reign of Aethelwulf.¹ Kent and Sussex are two of the heptarchic kingdoms whose original shires are perhaps represented by their lathes and rapes.² In Wessex the shire system attained its earliest and purest development. The West Saxon shires retain to this day the names and boundaries of the early settlements founded by the successors of Cerdic. It is more than likely, however, from the evidence of local nomenclature, that Mercia was artificially divided into shires by the English kings after the reconquest from the Danish invaders.³ In the consolidated kingdom the entire system of local administration is vested in the shires, while the central and national powers are vested in the king and witenagemot. The consolidated kingdom is, in fact, a mere aggregation of shires, whose governments represent the entire local machinery of the constitution. Or, to state the matter in another form, now the kingdom forms a new whole, of which the shires have sunk to be mere administrative divisions. The primitive state in descending to the status of a shire preserves substantially all its powers as a local self-governing community. The tribal king has passed away, it is true, and his place has been filled by the ealdorman, who stands in the government of the shire as the deputy of the national king;⁴ but the popular assemblies of the primitive state all survive as parts of the shire system. The primitive state assembly is the folk moot, the highest popular court of the shire, and as such it retains some traces

Consolidated kingdom an aggregation of shires.

Folk moot survives as shire moot.

¹ *E. Chron.* a. 851, 860.

² "Kent, however, appears as 'Cantescyre' as early as the reign of Athelstan. Essex, Middlesex, and Surrey are also ancient kingdoms." Stubbs, *Constitutional History*, i. 109.

³ Freeman, *Norman Conquest*, i. 32, and Appendix, note E.

⁴ Sohm, *Altd. R. u. G. Verf.* i. 25, 26.

Hundred
and tun
moots.

The king.

of the ancient nationality.¹ The primitive shire court survives as the hundred court of the consolidated kingdom, the ordinary law court in which all causes are heard in the first instance. Beneath the hundred courts stand the tun moots, the governing bodies of the village communities or townships. In the organization of these local courts the fundamental Teutonic principle is preserved intact; the administration of law, as well as political administration, is vested in an expanding series of popular assemblies composed of the qualified freemen whose interests are directly involved. If the constitutional powers of the consolidated kingdom be classified according to modern ideas, the executive power was vested in the king; the legislative, in the king and witan; the judicial, in the witan and the local courts.

From Caesar's sketch the conclusion may be drawn that in the homeland kingship was the exception and not the rule.² It seems to be clear that the chiefs who led the war bands to the conquest of Britain bore no higher title than that of ealdorman or *heretoga*.³ As the conquest advanced, and as definite districts of country were permanently secured, and as the various groups of conquerors within such district felt the need of drawing together under a permanent instead of a temporary leadership, the ealdorman or *heretoga* was advanced to the dignity of a king,⁴ who could represent in

¹ The bishops of Kent, and all the thegns, eorl, and ceorl of Kentshire, declare to Aethelstan in their gemot at Faversham their acceptance of measures taken in the recent witenagemot of Greatley. For the document containing this popular acceptance of a law, see Thorpe, i. 216; for comments upon it see Kemble, *Saxons in England*, ii. 233; Hallam, *Middle Ages*, ii. 376; Palgrave, *Commonwealth*, p. 637.

² "In pace, nullus est communis magistratus; sed principes regionum atque pagorum inter suos jus dicunt." *Bell. Gall.* vi. 23. Tacitus clearly distinguishes the monarchical tribes from the non-monarchical, without intimating the extent to which royalty prevailed. *Germ.*, cc. 25, 44.

³ "Heora *heretogan* waeron twegen gebroðra, Hengest and Horsa." *E. Chron.* a. 449.

⁴ "The word *rice* I take to mark the change from ealdormanship to kingship." Freeman, *Norman Conquest*, i. 392, Appendix K.

his person the unity of a new national life. In order to attach the idea of permanency to the new kingship, the name of the son was associated with that of the father as a recognition of the hereditary principle, attended and modified by the older principle of election. The right to the throne might be vested by the original choice in a single royal house, but the question as to which members of that house should receive the succession when a vacancy occurred was one the national assembly alone could determine. Out of the Teutonic conquest of Britain thus arose a brood of petty kings whose presence in every principality retarded the growth of a national unit for centuries. As the process of aggregation advanced, the institution of kingship grew with each extension of territory. As an heptarchic king rose in power and importance above the petty royal head of a primitive state, so did the king of all the English rise in power and importance above the heptarchic king. In the process of aggregation was thus involved the growth of kingship, and in the growth of kingship were involved all the elements of constitutional life. As the smaller kingdoms grew into a single state, and as the king of the one united kingdom became the king of the whole nation, the relation of lord and man, inherent in the *comitatus*, widened into the principle that the king was the lord or patron of his people, and was so recognized in the earlier laws.¹ Thus in time peace and justice, which belonged at first to the folk, became the king's peace and the king's justice, enforceable by his personal servants, while the folkland is gradually transformed into *terra regis*.² By the force of the same principle the king's thegns and the great ecclesiastic persons and bodies changed

Hereditary principle limited by right of election.

How king became lord and patron of his people.

¹ See the legislation of Aelfred, § 4, "He who plots against his lord's life, let him be liable in his life to him and in all that he has, or let him prove himself true according to his lord's wer."

² See Nasse, *On the Agricultural Community of the Middle Ages* (Ouvry's trans.), p. 28; Digby, *Law of Real Property*, pp. 10-19.

their relations to the waste lands originally belonging to the townships. As the principle of lord and man widened, the free communities were gradually reduced to a dependent condition.¹ All the elements of feudalism thus existed before the Conquest, ready to be worked into that systematic feudal system for which that event prepared the way. The general nature of the transition has been described as a movement from personal to territorial organization, — from a state of things in which personal freedom and political right were the dominant ideas to a state of things in which these ideas have become bound up with and subservient to the relations arising out of the possession of land.² While the king of the consolidated kingdom could perform no important act without the consent of the national assembly, he was no mere puppet in their hands, for the assembly was equally powerless to act without his concurrence. His revenues, which were not contingent upon legislative grants, must have been sufficient to maintain the royal state and dignity. In addition to the sums that accrued to the king from his private estates, which he possessed as an individual,³ from the folkland in the nature of rents (*cyninges-gafol*), he received revenues from the following sources: from fines levied in the courts of law to the king's use, as conservator of the public peace; from treasure trove, wreck, mines, salt works, and the mint; from tolls, markets and ports, and from transport by roads and navigable streams; from the heriots which were assessed upon the estates of the king's special dependents according to their rank; and from escheats and forfeitures.

Movement
from per-
sonal to
territorial
organiza-
tion.

Royal
revenue.

¹ As to the "Rise of the Manor out of the Mark," see Maine, *Village Communities*, p. 143.

² "The Angel-cynn of Alfred becomes the Engla-lande of Canute." Stubbs, *Constitutional History*, i. 166.

³ In a grant made about 980 by Aethelred to Abingdon he draws the distinction between his *propria hereditas* which he could alienate, and the *terrae regales et ad regios filios pertinentes*, whose alienation the witan had refused to sanction. *Cod. Dipl.*, no. 1312.

The king had the right to maintenance for himself and suite when in public progress; and he had also the right to license the building of bridges and fortresses.¹ Thus supported by an independent revenue, the king was able to deal upon equal terms with the witan, with whose advice and consent he performed all important acts.

The national assemblies of the heptarchic kingdoms are not folk moots but witenagemots; they are not great popular gatherings of an entire nation, but small aristocratic bodies composed of the great and wise of the land. In the absence of the principle of representation it is easy to understand how an originally democratic assembly, into which the magnates of the land entered as great factors, would naturally shrink up into a narrow aristocratic body composed of the magnates only, wherever the extent of territory to be traversed rendered it difficult for the mass of the people to attend. The results of this principle are practically the same whether worked out in England or Achaia.² Through a perfectly natural process the folk moot, the meeting of the people, was converted into a witenagemot, the meeting of the wise, in which were considered all matters involving the general good. Such is the history of the witan, whether considered as the supreme council of an heptarchic state or as the supreme council of the whole English nation when finally united in a single consolidated kingdom. That such a change did take place, and that the whole body of the people did retain for a long period of time the abstract right to be present in the national gemot, may be implied from a series of vestiges beginning with the Dooms of Aethelberht and extending beyond the Norman Conquest. As the work of consolidation advanced, the magnates of the conquered kingdoms became entitled to seats in the Witan of Wessex, which finally became

Constitution of the witan.

England and Achaia.

¹ See Kemble, *Saxons in England*, i. 151; ii. 54, 55-78, 94, 98-102; *Essays in Anglo-Saxon Law*, pp. 64 sq.

² Cf. Freeman, *History of Federal Government*, pp. 266, 267.

Witan of
Wessex
became
Great
Council of
the Empire.

the Great Council of the Empire.¹ The supreme powers of the consolidated kingdom were vested in the king and the witan, who possessed the right to consider all public acts the king could authorize, including many acts which, according to modern theories, would be considered as purely executive. In every act of legislation the right of the witan to advise and consult was invariably recognized. As the king's revenue from the public lands, from his private estates, and from other sources was sufficient to maintain the royal state, it was not necessary to provide a royal revenue by taxation. Not until the period of the last Danish invasion did circumstances arise which required the imposition of a general tax for the public service,—with the imposition of the Danegeld the history of English taxation really begins.² The witan had the right, conjointly with the king, of making alliances and treaties of peace, and of settling their terms.³ The folkland was administered and conveyed conjointly by the king and the witan.⁴ The witan, who possessed the right to elect the king, possessed also the correlative right to depose him whenever his government was not conducted for the good of his people.⁵ The witan legislated for the church as it did for the state, and the king and the witan had power to appoint prelates to vacant sees.⁶

History of
taxation
begins with
Danegeld.

Right of
election and
deposition.

¹ The number of the witan thus increased with the expansion of the realm. As to the composition of the witan held in 934, in the reign of Aethelstan, and another held in 966, in the reign of Eadgar, see *Cod. Dipl.*, nos. 364 and 518. In the first an act of the witan is described as having been executed *tota populi generalitate*.

² The assessment of 1008, in which we find the origin of ship money, is recorded in the Abingdon and Peterborough Chronicle for 1008. For the text, see Taylor, *The Origin and Growth of the English Constitution*, i. 187, note 2.

³ See Aelfred and Guthrum's Peace in Thorpe, *Laws and Institutes*, i. 152.

⁴ Nearly every grant professes to have been made by the king *cum consilio, consensu et licentia procerum*, or in some like formula.

⁵ The Chronicle says, "This year (775), Cynewulf and the West Saxon witan deprived his kinsman Sigebert of his kingdom, except Hampshire, for his unjust doings." At least two cases of deposition appear to have occurred among the descendants of Ecgbert. See *The Origin and Growth of the English Constitution*, i. 190 sq.

⁶ Such was the theory; as to the practice, see Stubbs, *Constitutional History*, i. 134.

German scholars have firmly established the fact that the Teutonic race, in the earliest known period of its development, vested not only political administration, but the administration of law, in an expanding series of popular assemblies composed of the freemen whose interests were directly involved. From what has been said it clearly appears that in the process of consolidation the ancient shire becomes the modern hundred, while the primitive state becomes the modern shire. The folk moot, the national assembly of the ancient kingdom, survives as the shire moot, an institution distinctly peculiar to England as compared with Germany.¹ The government of the shire is divided between the ealdorman and the scir-gerefa or sheriff, — the one the representative of the nation, the other of the king. The shire moot was simply the ancient folk moot, the assembly of all the freemen resident within the shire; and, like the hundred moot, it was attended by all lords of lands (called in this respect *scir-thegns*),² by the parish priest, the reeve, and four men selected from each township,³ and by the twelve senior thegns from each hundred.⁴ The shire moot was, therefore, not only a popular but a representative assembly, each township and each hundred within the shire being present in the person of its representatives. The shire moots thus became the training schools of the English nation in self-government on the representative plan. When John, in 1213, summoned for the first time the "four discreet men" from each county to appear as representatives in the great council, he simply applied to national purposes a system of representation that had existed from the earliest times. "The four men and the reeve had from time immemorial represented the township in the shire

Constitution of the shire moot.

Training schools in self-government.

Germ of representative system.

¹ Waitz, *loc. cit.*, ii. 494; *Essays in Anglo-Saxon Law*, p. 21.

² *Cod. Dipl.* vi. 198.

³ This fact, "left questionable in the laws, is proved by the later practice." Stubbs, *Constitutional History*, i. 115. See also Bigelow, *History of Procedure*, 133.

⁴ *Cod. Dipl.* iv. 137.

moot; now the four men and the sheriff represented the shire moot in the national council.”¹ The twelve senior thegns who came from each hundred to the shire moot, as inquisitors of all crimes committed in the hundred to which they belonged, probably represented the earliest form of the criminal jury of presentment.² In the community witnesses who appeared in the shire moot to testify concerning circumstances, long-continued relations, and occurrences known to them as neighbors,³ we find embodied the germ out of which was developed, under the influence of the Norman writ process, the jury of judgment, the trial jury of modern times. The law administered in these popular courts, through clumsy forms of archaic procedure, was strict law, whose severity went untempered by any kind of equitable jurisdiction. The only way in which the strictness of the customary law could be avoided was by compromise, which seems to have been effected wherever it was possible.⁴ The presiding officer of the shire moot was the scir-gerefa, and with him were the ealdorman and the bishop,—the one to declare the law temporal, the other the law spiritual.⁵ In the popular courts there was no separation of secular from spiritual jurisdiction. Such was the general condition of things before the archaic judicial constitution was torn in pieces by the growth of the aristocratic and feudal element represented by the thegns, at whose head stood the king. It is admitted on all hands that, certainly before the Norman

Germ of
jury system.

Officers of
the shire.

Growth of
immunities.

¹ *Select Charters*, p. 287.

² Cf. Forsyth, *Trial by Jury*, p. 57; Palgrave, *English Commonwealth*, i. 213; Stephen, *History of Criminal Law*, i. 68, 69.

³ Brunner, *Die Entstehung der Schwurgerichte*, pp. 50–53; Bigelow, *History of Procedure*, p. 309.

⁴ “Arbitration was, perhaps, the habitual mode of settling disputes among the Anglo-Saxons.” *Essays in Anglo-Saxon Law*, p. 26.

⁵ “And let the hundred gemot be attended as it was before fixed; and thrice in the year let the burg-gemot be held; and twice, a shire-gemot; and let there be present the bishop of the shire and the ealdorman, and there both expound as well the law of God as the secular law.” Eadgar, ii. 5; Cnut, ii. 18.

Conquest,¹ jurisdiction was granted to private individuals without stint; that private law courts did exist by virtue of royal grants made with or without the consent of the witan; and that by virtue of such grants jurisdiction ceased to be exclusively a public trust, and often became a private right accompanying the possession of land. In some instances these private jurisdictions embraced large districts, but usually only the jurisdiction of a hundred. As a general rule the law court created by royal grant was simply a hundred court in private hands.²

During the period that intervened between Eadgar and William (958-1066) the national unity, established through a premature and imperfect concentration of powers around a single throne, was constantly strained and weakened by the counter force of the feudal and provincial spirit. The political history of that century is the history of the struggle between the power of the nation as embodied in the crown and the provincial power asserted by the great ealdormen who were ever striving in the direction of feudal isolation. The greatest defect in the political system as a whole arose out of the weakness of the tie that bound the central powers of the state to the local machinery of the constitution. There was a want of strong organic connection between the king and the witan, as the representatives of the nation, and the system of provincial organization embodied in the shires. In the struggle between the contending forces the defensive power of the nation was broken; the spirit of disunion and disorder which was ever assailing the foundations of the throne was equally ready to paralyze the national arm

From
Eadgar to
William
(958-1066).

Lack of
cohesion
between
central
and local
powers.

¹ There is no evidence before the reign of Cnut (see Dr. K. Maurer, *Kritische Ueberschau*, ii. 58); no conclusive evidence before the reign of Eadward the Confessor (*Essays in Anglo-Saxon Law*, pp. 27-54). See also Taylor, *The Origin and Growth of the English Institution*, i., pp. 207 sq.

² Digby, *Law of Real Property*, p. 15. "The machinery of the hundred court would, however, be preserved, except that the territorial court would be by the great man or his representative."

Feudal
tendency
to disruption checked
by God-
wine.

Local
dissensions
made
Norman
Conquest
possible.

Norman
duchy and
its dukes.

Colony at
Rouen, 911.

in the presence of the invader. The history of the reign of Eadward the Confessor is simply a continuation of the struggle of the great nobles, whose authority completely overshadows that of the king. The feudal tendency to disruption does not prevail simply because the great Earl Godwine, who is striving to win the crown for his own house, is strong enough to counteract it.¹ Upon his death (1053) the earldom of the West Saxons passed to his son Harold, who for twelve years stood forth as the real master of the realm. When the death of the childless Eadward had removed the last obstacle from his path, the mighty son of Godwine was elected by the witan to the vacant throne. But it was impossible even for Harold to bind together the broken power of the kingdom with the great earldoms of Mercia and Northumbria in the hands of two jealous rivals, Eadwine and Morkere, whose treacherous policy really opened the way for the Norman Conquest. Under the heel of the stranger the English nation for the first time awoke to a full sense of its oneness.²

7. Early in the tenth century, while the great struggle between Paris and Laôn was still in its infancy, the inroads of the Northmen passed from a stage of mere piratical incursion to one of conquest and settlement. But of the many Scandinavian colonies then planted in Gaul, only one was destined to preserve a distinctive character, and to leave its impress upon the history of Europe. This was the Danish colony, planted in 911 by Rolf or Rollo at Rouen. At this moment, when the history of Rolf clearly emerges from the legends that surround it, Duke Robert of Paris stands as the

¹ "Policy led the earl, as it led his son, rather to aim at winning England itself than at breaking up England to win a mere fief in it." Green, *History of English People*, i. 105.

² "When Harold, imitating the Capetians, raised himself to the throne, the natural consequence would seem to have been that England should share the fate of France. To have prevented this was the one great service which William rendered to mankind." *North American Review* for July, 1874, p. 238.

vassal of Charles the Simple, who then represented the royal house at Laôn. It was with King Charles that Rolf made the peace of Clair-on-Epte in 912; and it was from King Charles that Rolf received the grant of the district of country on both sides of the Seine which he held already by the sword.

The original grant to Rolf did not embrace, however, all of the later Normandy. The Teutonic district of Bayeux¹ was not won until a few years before Rolf's death; and it was not until the reign of his successor, William Longsword (927-943), that the limits of the duchy were extended by the acquisition of the districts of Avranches and Coutances.²

Original
grant to
Rolf.

If any records ever existed touching the details of the settlement made by Rolf and his followers at Rouen, or touching the legal and political institutions planted by them in Gaul, they have utterly perished. There are no chronicles, no charters to guide us; of the internal organization of the Norman duchy in the early days of its history we know absolutely nothing. It seems, however, to be clear that the express condition upon which the grant to Rolf was made was that the new settlers should become members of the Christian and Frankish commonwealth of which Charles was overlord.³

Condition
upon which
it was
made.

And it also seems to be clear that the Norman dukes from the very beginning ruled not as absolute sovereigns, but with the advice of some kind of an assembly or council of great men.⁴ As the time for the conquest of England approaches the duke consults, or professes to consult, the magnates of his realm, lay and spiritual, the *optimates*, the *proceres* of Normandy. The court he holds may not yet be called a court

An
assembly of
magnates.

¹ As to the history of the Saxons of Bayeux, see Lappenberg, *Anglo-Norman Kings*, p. 2.

² Freeman, *Norman Conquest*, i. 118-123.

³ The Peace of Clair-on-Epte (918) was the duplicate of the Peace of Wedmore (878).

⁴ Extreme views on this subject are marked at one end by Palgrave (*Normandy and England*, ii. 258 sq.) and at the other by Steenstrup, *Inledning i Normannertiden*. Copenhagen, 1876. There is a French translation of the latter in the *Bulletin de la Société des antiquaires de Normandie*, vol. x., p. 185.

Lower
courts.

of his tenants in chief, but it is an assembly of magnates who are his vassals. It also appears that in the lower courts the lord of the court is not the only judge; he is surrounded by doomsmen.¹ In the reign of the third duke, Richard the Fearless, the duchy, after fluctuating in its allegiance between the king at Laôn and the duke at Paris, permanently attached itself to the latter, and from that time the duchy grew more French, more Christian, and more feudal.² It is in the reign of Richard that we can first trace the beginnings of the Norman nobility whose numbers derive their status as nobles either from ancient Norse descent from the companions of Rolf or through connections, legitimate or illegitimate, with the ducal house. The baronage which thus grew up held their lands of the duke upon terms of feudal obligation, and by his strong hand alone were they held in subjection.³ Over this turbulent baronage, William the Bastard, while yet a minor, was called to rule; and his first important victory was won in crushing a widespread revolt headed by some of the greatest nobles of his own dukedom.

Norman
nobility.

Normans
French as
to language
and law.

No matter whether for a century or more after their settlement in Neustria the law of the Northmen or Normans was mainly Frankish or mainly Scandinavian. It is now generally conceded that for at least fifty years before the Conquest of England the Normans were Frenchmen, both as to language and law. While their written language was Latin, the Latin of France, their spoken language was French. Not only had the Normans adopted a Romance tongue, but their dukes had adopted the official machinery of Frankish government, including, of course, whatever Roman elements had

¹ In a suit heard in 1086 in the court of Robert of Bellême he presides, but three abbots, nine named laymen, and many others are the *judices hujus placiti*. *Neustria Pia*, 311.

² Freeman, *Norman Conquest*, i. 149, 169.

³ Richard the Fearless is regarded as the founder of Norman feudalism. *Normandy and England*, ii. 534. See also Waitz, *Göttingische Gelehrte Anzeigen*, Nachrichten, February 14, 1866, pp. 95, 96.

been taken up by the Franks. In that way the Normans were drawn into close contact with that peculiar system of legal and political ideas, distinctly of Frank origin and generally known as feudalism, which finds its historical development upon the soil of Gaul, where it matures not unaffected by Roman influences.¹ That system can only be clearly understood as a whole when it is viewed in the two aspects in which it naturally presents itself, — as a system of land tenure and as a system of government. Feudalism was the result of the union of two great elements. One element consisted of the personal relation that grew up between lord and vassal, lord and man, — a relation involving menial service, responsibility, and protection, but at first not necessarily connected with the holding of land.² By the practice of commendation the inferior put himself under the personal care of a lord, without altering his title or divesting himself of his right to his estate.³ Another element was represented by the *beneficium*, which was partly of Roman, partly of German origin. A practice had arisen in the empire of granting out frontier lands to soldiers upon condition of military service in border warfare.⁴ But the holders of such lands stood in no personal relation to the emperor; they were not his men; their service was only due to him as the head of the state. That Roman custom naturally suggested to the Teutonic kings the plan of rewarding their followers out of their own estates with grants of land — benefices or fiefs⁵ — with a

Contact
with Frank
feudalism.

Its
elements.

Commenda-
tion and

beneficium.

¹ The feudal system *par excellence* is always understood to mean that special form of feudalism developed on the soil of Gaul by the conquering Franks.

² Digby, *Law of Real Property*, p. 21.

³ Stubbs, *Constitutional History*, i. 253.

⁴ Palgrave, *English Commonwealth*, i. 354.

⁵ On the Continent when the word *feodum* is traced back it becomes interchangeable with *beneficium*, and as we go further back we find *beneficium* interchangeable with the Roman *precarium*, which is now generally admitted to be one of the germs of feudalism. Waitz, *Deutsche Verfassungsgeschichte*, ii. 229; Brunner, *Deutsche Rechtsgeschichte*, i. 211; Fustel de Coulanges, *Le bénéfice et le patronat*. Even in the *Digest*, 43, 26, 14 (Paulus), the two words *precarium* and *beneficium* are brought into contact, "magis enim ad donationes et bene-

Origin of
Frank
beneficiary
system.

special undertaking to be faithful in consideration of the gift. The Frank beneficiary system originated in gifts of this character and in the surrender of allodial estates made by the owners to lay or ecclesiastical potentates, to be received back and held by them as tenants by rent or service.¹ Through the union or interpenetration of the beneficiary system and the system of commendation, the idea of feudal obligation became complete, both being fostered by the growth of immunities.² The *beneficia* finally received the name of *feuda*, a word which does not appear earlier than the close of the ninth century.³ The viscounts and barons of Normandy held *beneficia*, *feoda*, *honores* of the duke, and in return they owed him military service, though the precise amount of it may not have been fixed.⁴ As early as 877 Charles the Bald, by a clause in the Capitulary of Kiersi, recognized the hereditary character of all benefices;⁵ and the principle that benefices were hereditary was soon extended to the framework of government itself. The provincial magistracies, originally received by the dukes and counts through the king's appointment, and which tended from the first to become hereditary, actually became so, as soon as the hereditary character of benefices was firmly established. The local sovereignty of the official magistrate, who thus grew into a ruler by hereditary right, was greatly enhanced by grants of immunity, which were nothing more nor less than sections of the royal right of judicature bestowed upon the receiver of a fief. Through grants of immunity the dwellers upon feudal estates were withdrawn from the jurisdiction of the royal tribunals and placed under

Capitulary
of Kiersi
and its
effects.

Grants of
immunity.

ficii causam quam ad negotii contracti spectat precarii conditio." See also Pollock and Maitland, *History of English Law*, i. 67-68.

¹ Maine, *Ancient Law*, p. 224, "Allods and Fiefs."

² Waitz, *loc. cit.*, ii. 634-635.

³ Digby, *Law of Real Property*, p. 32.

⁴ William the Conqueror gave to the church of Lisieux "terram de Fontaines . . . et servitium militum . . . dominium cum militibus quod dedit Olilia." *Neustria Pia*, 585; *Gall. Christ. xi. Instrum.*, p. 203.

⁵ See Baluze, ii. 179; Roth, *Beneficialwesen*, p. 420.

that of the lord on whose land they dwelt.¹ To the right of judicature the hereditary ruler gradually added all the other attributes of actual sovereignty. So intense did the idea of sovereignty in the provincial lord become, that the doctrine was finally asserted, that a man who pledged his faith to a lord, who was the man of the king, was the man of that lord only, and not the man of the king himself.² The natural result of such a system was the complete attenuation of the central power. In theory the king remains the supreme lord, mediate or immediate, of every landowner, and to him great duties are due; but the royal power is reduced in fact to a mere shadow. With the destructive effects of Frank feudalism upon the central or national authority, William, as duke of the Normans, became thoroughly familiar; and, as we shall see hereafter, he turned such knowledge to good account. As king of the English, William was careful to devise such anti-feudal legislation as would render the disruptive tendencies of the Frank system impossible in England.

Attenuation
of central
power.

Its effect on
William's
English
policy.

From what has just been said it appears that the Scandinavian founders of the Norman duchy were far behind their English brethren in the production of written memorials of their early laws. They have nothing corresponding with the laws of Eadward the Elder, Aethelstan, Eadmund, Eadgar, Aethelred, and Cnut, or with the land books and writs supplied by the England of the same period. They have nothing to set against the great record of Domesday or against the law books known as the *Leges* of the Confessor, the Conqueror, and Henry the First. The oldest financial³ and judicial

Normans
destitute
of memo-
rials of
early laws.

¹ Waitz, *loc. cit.*, ii. 634-645.

² Cf. Freeman, *Norman Conquest*, iv. 472, and note 1, in which reference is made to the refusal, at a somewhat later time, of John of Joinville, as the man of the court of Champagne, to take any oath to St. Lewis; citing *Mémoires*, p. 37, ed. Michel. Paris, 1858.

³ Magni Rotuli Scaccarii Normanniae sub Regibus Angliae, reprinted in *Mémoires de la Société des antiquaires de Normandie*, vol. xv. A fragment of the roll of 1184 was published by Delisle, Caen, 1851.

Oldest law
books.

World-
famous
jurist of
Pavia,
Lanfranc.

Became
primate of
England.

records¹ as they have come down to us are of much later date than the parallel English documents. Their oldest law books, two small treatises now blended and published under the title *Le très ancien Coutumier*, are more recent and less pretentious than Glanvill, while the *Grand Coutumier*, if not more recent, is less pretentious than Bracton.² As great jurists have told us, "not only had the Normans no written law of their own making; there was none that they could readily borrow from their French neighbors. Their invasions occurred in the very midnight of the legal history of France; indeed, they brought the midnight with them."³ But destitute as the Normans were of written law, William had at his side a world-famous jurist of Pavia, the most accomplished of pleaders, who knew Lombard law, Roman law, and canon law.⁴ While still a layman Lanfranc left Italy for Normandy and opened a secular school at Avranches, in which he may have taught law as well as grammar and rhetoric. Upon this Italian abbot from Normandy, who became a master of English law,⁵ the primatial see of Canterbury was bestowed as soon as it could be made vacant by the deposition of Stigand.⁶ With the aid of Lanfranc, William inaugurated the new ecclesiastical policy which contemplated the complete severance of spiritual from temporal business through the creation of distinct courts and councils in which the church could judge and legislate upon its own affairs without secular interference.⁷

¹ See Delisle, *Recueil de jugements de l'échiquier de Normandie au XIII^e siècle*. Paris, 1864. For a collection of judgments delivered in the assizes between 1234 and 1237, see Warnkönig, *Französische Staats- und Rechtsgeschichte*, vol. ii. *Urkundenbuch*, pp. 48-69.

² The Latin text has been lately edited by E. J. Tardif under the title *Somma de Legibus Normannie*, 1896.

³ Pollock and Maitland, *History of English Law*, i. 65; 2d ed.

⁴ See above, p. 149.

⁵ He waxed eloquent even over *sake and soke* and *flymen-fyrmd*. Selden, *Eadmer*, 197; *Placita, Anglo-Normannica*, 7.

⁶ *Vita Lanfr.*, Giles, i. 19, 20, 293; *Flor. Wig.* 1070.

⁷ See Taylor, *The Origin and Growth of the English Constitution*, i. 339.

8. It is a mistake to suppose that William's victory near Hastings, crushing as it was, put him at once in possession of the whole realm. As the immediate result of the battle he only gained actual possession of a few of the southern shires; but, during the month and a half that intervened between his victory and his crowning at Westminster, he received the submission of all southeastern England east of a line roughly extended from the Wash to Southampton Water.¹ With the fact in mind that the advance of the Conquest was gradual, it is easier to understand the manner in which William dealt with the land, which, district by district, became subject to his authority. The theory upon which the Conqueror claimed title to the lands of the conquered was, that he, the heir of Eadward, upon coming to take possession of his kingdom, had been opposed either actively or passively by the whole nation, who, by the customary laws of both England and Normandy, had thus become involved in the guilt of treason.² Under the strict letter of the law, the lands of all were forfeited to the king, but the application of this principle William undertook to regulate according to the circumstances of individual cases: While there can be no doubt that through the enforcement of that principle the bulk of all the great estates passed during William's reign into Norman hands, it seems to be equally clear that the main body of the people, the actual occupants of the soil, remained, as a general rule, undisturbed in their possessions. William was himself enriched by becoming the possessor of the private estates of his royal predecessors, and by all the folkland becoming *terra regis*. In some instances express mention is made of men's buying back their lands from the king, and from the joint witness of the Chronicle and Domesday it appears that at some time soon after the coronation of William the English as a body redeemed

Norman
Conquest of
England.

Its advance
gradual.

Application
of doctrine
of forfeiture.

Terra regis.

¹ For a graphic account of "The Conquest of Western and Northern England," see Freeman, *Norman Conquest*, vol. iv., ch. xviii.

² Digby, *Law of Real Property*, pp. 34, 35.

Fusion of
two kindred
systems of
tenure.

their lands.¹ There is no evidence, however, going to show that William directly or systematically introduced any new kind of tenure; the grantee of William, whether an old owner or a new one, held his land as it had been held in the days of King Eadward. There is nothing in Domesday which establishes the existence of military tenures as they were afterwards understood.² By the coming of William two kindred systems of land tenure, both tending in the same direction and yet in different stages of development, were brought into the closest contact, and out of the fusion between the two has arisen the feudal mode of holding land embedded in the English common law. The great outward show of legality under which William endeavored to conceal the fact that he was a foreign conqueror was but a part of a deliberate policy which has marked him as one of the foremost statesmen of the world. By claiming to be the heir of Eadward, he connected himself directly with the line of national kings that had gone before him; by insisting upon his elevation to the royal office by the choice of the witan he obtained the highest confirmation of his title that could be drawn from the ancient constitution; by seeking consecration at the hands of an English prelate, and by taking the usual coronation oaths, he complied at once with every prerequisite to full kingship prescribed by ancient custom and by the national church. By means of these outward forms William clearly proclaimed the fact, not only to the conquered English but to his Norman followers, that he would rule in his new realm, not as a mere feudal conqueror, but as a national king. The sum of royal power which thus accrued to William was augmented by the addition of every feudal right that tended to increase the royal revenue and to strengthen the royal authority; while every principle was carefully eliminated that tended

William a
national
king as well
as feudal
conqueror.

¹ *E. Chron.* 1066. *Domesday* (ii. 360) tells of a time when the English as a body redeemed their lands.

² See Palgrave, *Normandy and England*, iii. 609 sq.

to promote the disruptive tendencies of feudal institutions. As king of the English William was careful to preserve the law of the land as it stood in the days of King Eadward,¹ and along with it those ancient assemblies of the shire and the hundred in which it had been immemorially administered.² As feudal lord, William firmly established the doctrine that the king was the supreme landlord, and that all land was held by grant from him. In his time the folklund became *terra regis*. All landholders thus became tenants of the king, and under William's successors the feudal revenue of the crown from that source was enormous. It was William's policy to introduce but one side of feudalism, — to accept it as a system of tenure, but not as a system of government. And in thus drawing to the crown all the available benefits of the system he was careful to guard against its disruptive tendencies: first, by preventing the accumulation in the hands of the great feudatories of any considerable number of contiguous estates;³ second, by requiring from all freeholders an oath that bound them directly to the king by the double tie of homage and allegiance.⁴ To every landowner the Conqueror stood in the double relation of landlord and sovereign. During William's reign the royal power was greatly strengthened and consolidated; the tendency to provincial isolation was crushed out; the four great earldoms were abolished; and the whole realm at last united in one consolidated kingdom never afterward to be divided.

Feudalism not accepted as a system of government.

Oath of homage and allegiance.

After the coming of William the continuity of the old national assembly went on unbroken. In legal theory, at

Continuity of national assembly.

¹ With such additions as he himself made for the benefit of the English. Statutes of William, § 7.

² "Requiratur hundredus et comitatus, sicut antecessores nostri statuerunt." *Ibid.* § 8.

³ Thorpe, *Lappenburg*, iii. 201; Gneist, *Self-Government*, i. 66, 67.

⁴ In the gemot of Salisbury all the landowners of England "whose men soever they were, all bowed to him and were his men, and swore to him faithful oaths that they would be faithful to him against all other men." *E. Chron.* 1086.

least, what the witan was in the days of King Eadward it seems to have remained in the days of King William. In the forms of legislation change there was none. William legislates, like his English predecessor, "with the common council and counsel of the archbishops, bishops, abbots, and all the princes of the kingdom."¹ The formal right of the witan to elect the king is still distinctly recognized. William is elected before he receives the crown at Westminster; Henry admits that he owes his election to the barons;² while Stephen rests his claim on the broader basis of a choice by the clergy and the people.³ At the coronation the people still formally accept the king elected by the national assembly, and the king upon his part still takes the oath of good government, whose pledges are expressed in the form of charters. The elective principle survives with diminishing force until it is finally extinguished in the time of the Angevins by the new feudal theory of hereditary descent. From the mention made by Henry of an aid that his barons had given him, it may be inferred that the king as of old, with the advice of the great council, laid taxes upon his people.⁴ A great change, however, took place in the composition of the witan. At the beginning of William's reign those who composed the council that ordinarily gathered around the king were a body of Englishmen; by the end of his reign this body had gradually changed into an assembly of Normans, among whom an Englishman here and there held his place. As the king's thegns became his tenants-in-chief, the national assembly of wise men gradually became the king's court of feudal vassals, whose right

Right to elect king still recognized.

New feudal theory of hereditary descent.

National assembly as court of feudal vassals.

¹ Thorpe, *Ancient Laws*, p. 213. See William's ordinance separating the spiritual and temporal courts.

² See preamble to charter of Henry I., *Ancient Laws*, p. 215.

³ "Ego Stephanus Dei gratia assensu cleri et populi in regem Anglorum electus." See second charter of Stephen, *Statutes of the Realm*, Charters of Liberties, p. 3.

⁴ Henry I. speaks of an aid as "auxilium quod barones mihi dederunt." *Chronicle of Abingdon*, ii. 113. See *First Report on the Dignity of a Peer*, pp. 38, 39.

to exercise power was made to depend practically upon the king's pleasure. The effects of the Conquest on kingship and on the constitution of the witan were diametrically opposite in their results. While the powers of the witan are practically reduced to a mere shadow, the royal authority becomes the central and dominant force in the constitution. In order to discharge the vast and intricate duties which the growth of the royal power thus concentrated around the person of the king, it became necessary for the crown to organize out of the main body of the great council a smaller body, composed of the king's immediate officers and advisers. The royal household of the Norman kings of England was simply a reproduction of the ducal household of Normandy; and while it is difficult to determine the exact dates of their formation, it seems to be clear that by the end of the reign of Henry II. the offices of high steward, butler, constable, and chamberlain had become hereditary in England.¹ Among the new ministerial offices which did not become hereditary, those of the justiciar, the chancellor, and the treasurer rise to the greatest constitutional importance. This inner council, known by the name of *curia regis*, and which during the Norman reigns drew to itself the whole central administration of justice and finance, has given birth not only to every court of law or equity in which justice is administered in the king's name, but also to the entire administrative machinery of the constitution. As a legal tribunal the jurisdiction of the *curia* was both civil and criminal,² original and appellate. It followed the person of the king, or of the justiciar in the

Royal
household
of Norman
kings.

The
curia
regis.

¹ Under the Frank kings and emperors the four great officers of the court and household were the steward, the butler, the marshal, and the chamberlain. G. L. von Maurer, *Hofverfassung*, i. 189. These offices, which became hereditary and which continued down to the latest days of the Empire, passed with slight modifications to the lowlier court of the Norman dukes, where they had begun to be hereditary before the conquest of England. Freeman, *Norman Conquest*, v. 287.

² Madox, *History of the Exchequer*, p. 70.

king's absence, and twice in every year it held sessions at Westminster in order to transact with the sheriffs the financial business of the kingdom. From the chequered cloth that covered the table at which the accounts were taken, the financial session of the *curia* took the name of exchequer.¹ In the course of the assessment and collection of the revenue, which was the chief work of the *curia* as a financial body, local disputes so constantly arose that it became necessary to send detachments of justices to adjust the business of the exchequer in each shire. As early as the reign of Henry I., officers of the exchequer were frequently sent through the country to assess the revenue;² and in the reign of his grandson, Henry II., this custom was enforced with systematic regularity. The justices while thus engaged in provincial business sat in the shire moots, where judicial work soon followed in the path of their fiscal duties. In 1176³ the kingdom was divided into six circuits, to each of which were assigned three justices, who are now for the first time given in the Pipe Rolls the name of *Justitiiarii Itinerantes*. The fiscal visitations of the justices from the exchequer led to the establishment of those judicial visitations which have ever remained an abiding feature in English judicature.⁴

The foregoing outline of the vigorous and compact system of central administration to which the Norman Conquest gave birth should be followed by an attempt to trace the effects of the Conquest on the tenacious substructure of Old-English local freedom upon which the Norman central system was

Financial side known as exchequer.

Six circuits of the *Justitiiarii Itinerantes*.

Effects of Conquest on local organization.

¹ *Dialogus de Scaccario*, i. 1.

² The single Pipe Roll of the thirty-first year of Henry I. exhibits a system of iters by the royal officers in regular working order. See also *Dialogus de Scaccario*, i., c. 7.

³ It was not until 1166 that the judicial eyres became annual and general. 2 *Benedictus*, pref. 64; Bigelow, *Legal Procedure*, p. 14. The division into circuits was provided for in the Assize of Northampton. For a list of them, see Reeves, *History of English Law*, i. 273. Also Plac. *Anglo-Normannica*, p. 216.

⁴ For a detailed history of the courts of assize, see Sir J. F. Stephen, *History of the Criminal Law of England*, i. 97-111.

superimposed. As the Norman superstructure was strongest in the higher ranges of organization, so the Old-English substructure was strongest in the cohesion of its lower organisms, — in the local associations of the township, the hundred, and the shire. The greatest amount of change that took place was in the status of the township, which, in the “process of feudalization,” underwent a marked transformation. The evidence seems to justify the conclusion that, before the Norman Conquest, all townships had, as a rule, become dependent; that is, the title to the land occupied by the once free community had become vested in a lord, and the dependent townsmen had become his men, or, in the language of later times, his tenants.¹ The word “manor”² is of Norman introduction, but the relation of a lord of a manor and his tenants substantially existed in every case in which a township had become dependent through the substitution of the lord for the community. The manorial system, which thus originates in Old-English and not in Norman law, assumed a more definite form in the hands of the Norman judges and lawyers, by whom the legal relations between the lord and the smaller holders within the manor were more exactly defined. By the time of the Domesday Survey the territorial lordships had become the rule; there were manors everywhere, and “the manor was a landlord’s estate with a township or village community in villeinage upon it, under the jurisdiction of the lord of the manor.”³ It seems to have been a leading feature in the policy of William to maintain the ancient usages of the English nation by keeping up the administration of the customary law in the popular courts of

The
township.

“Manor,” a
dependent
township.

¹ *Essays in Anglo-Saxon Law*, pp. 88–90; Digby, *Law of Real Property*, pp. 43, 45.

² The earliest appearance of the word is in the reign of Eadward the Confessor. Ellis, *Introduction to Domesday*, p. 225.

³ Seebohm, *English Village Community*, p. 82. At the date of the Survey 1422 manors were in the ancient demesne of the crown, most of which had been royal manors in the days of King Eadward. Ellis, *Introduction to Domesday*, p. 225.

the shire and the hundred. He confirmed the laws that had been in use in the days of King Eadward, with such additions as he himself had made for the benefit of the English.¹ From the same source we hear of the continuance by him of the courts of the shire and the hundred.² The existence of these courts in the succeeding reign of William Rufus is not only proven by the expressive entry in the Chronicle, which describes Ranalf Flambard as "driving all the gemots throughout England,"³ but by writs addressed to the shire moot through the sheriff and other leading members. From the language of the charter in which Henry I. orders the holding of the courts of the shire and hundred, it may be inferred that they had been used in the preceding reign for the purpose of extraordinary exactions. And in the same charter Henry says, "I will cause those courts to be summoned when I will, for my own sovereign necessities, at my pleasure."⁴ From the issue of Henry's charter (1108-1112 A.D.) onward, the local courts are held, "as in King Eadward's day, and not otherwise." From the *Leges Henrici Primi*, as they are called, — a compilation later than his reign, — we learn that, after the Conquest as before, the shire moot was attended by the "thegns of the shire,"⁵ by the parish priest, and by the reeve and four selectmen from each township.⁶ The full court which met twice a year still possessed both civil and criminal jurisdiction exercised according to the old forms of witness, compurgation, and ordeal. A great innovation in the proceedings of the popular courts now arose out of the introduction by the

Courts of
shire and
hundred
continued.

Held "as in
King Ead-
ward's day,
and not
otherwise."

¹ Statutes of William, § 7.

² "Requiratur hundredus et comitatus, sicut antecessores nostri statuerunt."
§ 8.

³ *Chron. Petrib.* 1099.

⁴ See *Foedera*, i. 12; *Select Charters*, p. 104.

⁵ *Leg. Hen. I.* vii. 2.

⁶ "Si uterque necessario desit, praepositus et sacerdos et quatuor de melioribus villae assint pro omnibus qui nominatim non erunt ad placitum submoniti."
Leg. Hen. I. vii. 7.

Normans of trial by battle.¹ By the so-called laws of Henry I. the court of the hundred was restored as it had been in the days of King Eadward, with no further constitutional change than was effected by the Conqueror's charter concerning jurisdiction in spiritual causes.

Introduc-
tion of trial
by battle.

The same general plan of reorganization which William applied to the remodeling of the state, he gradually applied to the remodeling of the church. With the councils of the year 1070 the Conqueror's ecclesiastical policy actively begins. In that year Pope Alexander II. sent to England three legates² to aid in the work of deposing the native bishops in order to make places for such Norman or other foreign prelates as the king could trust. The natural result of the deposition of the native bishops, and the elevation of their foreign successors, was to draw the English church from its position of practical independence and isolation into closer communion with the rest of Western Christendom, and into greater dependence upon the see of Rome. William was careful, however, to provide that the Roman pontiff should not interfere with the internal affairs of the church, except under such limitations as should be fixed by him. But in spite of such restrictions the English church was brought into closer connection with Rome through the Conquest, and the result was the tendency that now began to manifest itself to sever the organization of the church from that of the state through a complete severance of ecclesiastical from temporal business by the creation of distinct courts and councils, in which the church could judge and legislate upon its own affairs without secular interference. By an express ordinance William and his witan decreed the separation of the spiritual from the temporal tribunals.³ This ordinance, after declaring the episcopal laws that had

Effects of
Conquest on
ecclesiastical
organiza-
tion.

Deposition
of native
bishops.

Closer
connection
with Rome.

Separation
of spiritual
from
temporal
tribunals.

¹ Bigelow, *History of Procedure*, p. 326.

² Bishop Ermenfrid and the cardinal priests John and Peter. *Ord. Vit.* 516 A; *Flor. Wig.* 1070.

³ For the text of the ordinance, see Thorpe, *Ancient Laws*, p. 213; *Select Charters*, p. 85.

previously been in force in England to be bad and contrary to the sacred canons, forbade the bishops and archdeacons to bring any cause involving questions of canon law, or questions concerning the cure of souls, before the courts of the hundred. Henceforth they are to hold courts of their own, in which causes are to be tried, not by the customary but by the canon law,¹ not yet a well-organized system of authoritative jurisprudence. Not until the reign of Stephen did the systematic study of the canon law begin in England. In 1149 Vacarius began his teaching of the civil and canon law at Oxford.² The same general causes that led to the organization of a distinct system of ecclesiastical courts soon led to the organization of a distinct system of ecclesiastical councils. During the primacy of Lanfranc the meetings of such councils, which were held at the same time as the regular gemots, became frequent.³ It was, however, no part of William's policy to allow to these ecclesiastical assemblies the right to legislate without limitation. Eadmer tells us that he "did not suffer the primate of his kingdom, the archbishop of Canterbury, if he had called together under his presidency an assembly of bishops, to enact or prohibit anything but what was agreeable to his will and had been first ordained by him."⁴ Under these circumstances, and subject to such limitations, the national councils of the English church finally became distinct bodies from the national parliaments. Owing to the jealousy and strife between Canterbury and York the assembling of general councils, after the independence of York had been vindicated by Thurs-

Vacarius
at Oxford,
1149.

Ecclesiasti-
cal legisla-
tion limited.

¹ "Non secundum hundred, sed secundum canones et episcopales leges, rec-tum Deo et episcopo suo faciat."

² "Tunc leges et causidici in Angliam primo vocati sunt, quorum primus erat magister Vacarius; hic in Oxenefordia legem docuit." Gervace, c. 1665. Cf. R. de Monte, 1149 A.D.

³ Such councils were held in 1071, 1074, 1075, 1076, 1078, 1081, 1086. See Latin Life of Lanfranc attached to the Canterbury Chronicle.

⁴ Eadmer, *Hist. Nov.* i. 6.

tan, became practically impossible. The government of the church thus passed to the two provincial convocations of York and Canterbury, which, as constitutional assemblies of the English clergy, have suffered no material change of organization from the reign of Edward I. down to the present day.

Convocations of York and Canterbury.

In view of the mighty changes wrought by the coming of William, it is not strange that as his reign drew to a close he should have desired to know "about this land, how it was set, and by what men."¹ From the well-known entry in the Chronicle, under the year 1085, we further learn that "he sent over all England into ilk shire his men, and let them find out how many hundred hides were in the shire, or what the king himself had of land or cattle in the land, or whilk rights he ought to have to twelve months of the shire." Under this order passed in the mid-winter gemot of 1085-1086 the Great Survey was made. By Lammas-tide the work was done, and the result was the famous record of Domesday.² The Survey was taken by royal commissioners, who went forth into every shire in order to prosecute their inquiries through the oaths of those who, in ordinary times, composed the county court. Oaths were exacted from the sheriff and all the barons of the shire and their Norman associates; every hundred appeared also by sworn representatives, and from each manor or township the priest, the reeve, and six villeins or ceorls.³ The leading fiction that pervaded the whole work was that King William was the immediate successor of King Eadward; their reigns were established as the two great periods of legal government; and the leading inquiry as to each parcel of land

Domesday Survey.

Taken by royal commissioners.

¹ *Chron. Petrib.* 1085.

² In order fully to grasp the nature and value of this great record, it is necessary to read Sir Henry Ellis's *Introduction*, in connection with Mr. Freeman's brilliant chapter entitled "Domesday," in *Norman Conquest*, vol. v., ch. xxii.

³ Ely Domesday, *Dom.* iii. 497. "Barones regis inquirunt, videlicet per sacramentum vicecomis scirae et omnium baronum et eorum Francigenarum, et totius centuriatus, presbiteri, praepositi, vi villanorum uniuscujusque villae."

Unit of
inquiry is
everywhere
the manor.

was, — who was its owner in the time of King Eadward? who was its owner at the date of the Survey? Throughout the record, "the unit of inquiry is everywhere the manor, and the manor was a landlord's estate, with a township or village community in villenage upon it, under the jurisdiction of the lord of the manor."¹ It is therefore possible to gather from the Survey a very definite idea of the internal organization of the manorial system, and of the different classes into which each manorial group was divided.

Gemot of
Salisbury.

From the Chronicle we learn that, immediately after the completion of the Survey, William went to Salisbury, "and there came to him his witan, and all the landowning men (landsittende men) of substance that were over all England, whose soever men they were, and all bowed down to him, and became his men, and swore oaths of fealty to him that they would be faithful to him against all other men."² In the statute which was passed it was provided that every free-man should take the oath of fealty to King William, that he should be faithful to him within and without England, that he would keep his lands and honors with all faithfulness, and would defend him before all men against all enemies.³ After the completion of this great act of precaution against the disruptive tendency of a principle of Frank feudalism, to which, more than to any other cause, can be attributed the falling to pieces of France and the imperial kingdoms, William passed over into Normandy, where he died in the following year. The Norman succession the Conqueror had bequeathed to his eldest son Robert, while the English succession was by the aid of Lanfranc secured to his second son, William the Red. The peace of the new

William's
successors.

¹ Seebohm, *English Village Community*, p. 82.

² *Chron. Petrib.* 1086.

³ "Statuimus etiam ut omnis liber homo foedere et sacramento affirmet, quod infra et extra Angliam Willelmo regi fideles esse volunt, terras et honorem illius omni fidelitate cum eo servare, et ante eum contra inimicos defendere." *Select Charters*, p. 83.

reign thus auspiciously begun was soon broken by a revolt of the chief men of Norman blood throughout England, who rose under the leadership of Bishop Odo, upon the pretext of supporting the claims of Robert to the whole of his father's dominions. Thus deserted and defied by the bulk of the greater nobles, William the Red at once fell back upon the loyalty of his English subjects, with whose aid the revolt was crushed, and the power of the baronage trampled under foot. The royal authority, thus left unchecked by the counterforce of the feudal power, became in the hands of the new minister, Ranulf Flambard, an irresponsible despotism. To Ranulf is attributed the organization of the system of military tenures, together with all the oppressive consequences that flowed from them. The system of feudal law which he seems to have worked into a definite and formal shape was applied with equal severity to all feudatories, temporal and spiritual. By his policy the local courts of the shire and the hundred were turned into engines of extortion; in the words of the Chronicler, "He drove and commanded all his gemots over all England."¹ William "was slain on a Thursday, and buried the next morning; and after he was buried, the witan, who were then near at hand, chose his brother Henry as king."² The promises contained in Henry's coronation oath, whose exact words are still preserved,³ were amplified into a comprehensive charter of liberties, which stands not only as the immediate parent of the Great Charter of John, but as the first limitation imposed upon the despotism established by the Conqueror and carried to such a height by his sons. Grave concessions were therein made to the clergy and to the baronage, while to the people at large were restored the laws of King Eadward, which symbolized the ancient consti-

Loyalty of
English to
William
the Red.

Organi-
zation of
military
tenures.

Charter of
Henry I.

¹ *Chron. Petrib.* 1099.

² *Chron. Petrib.* 1100. As to the election, see William of Malmesbury, *G. R.*, vol. v., § 393.

³ See Maskell, *Mon. Rit.* iii. 5, 6; *Select Charters*, p. 99.

His marriage with Matilda.

Bishop Roger organizer of new fiscal and judicial system.

tution, with such amendments as the Conqueror had made.¹ The hold thus acquired upon the English nation, by the accident of birth and by the grant of a charter, Henry soon strengthened by a marriage with Matilda, the sister of Eadgar Aetheling, the last king of the ancient house of Cerdic and of Woden. Thus intrenched in the affections of his English subjects, Henry was strong enough to make Normandy an English dependency, and to crush the unfaithful barons who stood by the side of Robert when upon his return from the Holy Land he came to challenge the English crown as the head of the Norman race. Upon the ruins of the greater feudatories Henry raised up a set of lesser nobles from whose ranks he selected the sheriffs and judges who were to aid him in the work of administrative reform. Chief among this new ministerial nobility dependent upon royal favor was Bishop Roger of Salisbury, who as justiciar became the organizer of the new fiscal and judicial system. From the reign of Henry I. the *curia*, whose methodical procedure imposed upon the despotic powers of the crown the restraints at least of administrative routine, can be distinctly traced as a supreme court of justice containing specially appointed judges, and presided over by the king or justiciar, who is occasionally distinguished by the title of "*summus*" or "*capitalis*." Under the guidance of Bishop Roger the whole judicial and financial organization of the kingdom, both central and local, was reorganized and remodeled. Not until the new feudal conception of kingship arose was it supposed that a kingdom, like any other estate, might, in the absence of a son, pass to a daughter. By the aid of that growing feudal theory Henry hoped to be able to settle the succession to all his dominions upon his widowed daughter Matilda. With that end in view, at the Christmas gemot of 1126-1127, Henry required all the

¹ "Legem Edwardi regis vobis reddo eum illis emendationibus quibus pater meus eam emendavit consilio baronum suorum." Art. 13.

great men of the land, both clergy and laity, to swear that they would, after his death, receive his daughter as Lady over England and Normandy.¹ Before the end of the year in which these oaths were taken, Matilda was married to Geoffrey, called Plantagenet, the son of the one enemy whom Henry feared, — Count Fulk of Anjou. But, in spite of all his precautions, Henry's experiment only paved the way to civil war. The death of the peace-loving king was followed by an outburst of anarchy, during which Stephen, the nephew of Henry and the nearest male heir of the Conqueror's blood, hastened over into England and was elected² and consecrated king with but little opposition. Not until the landing of Matilda in 1139 did the period of general civil war actively begin, a period during which England, for the first and last time in her history, sank into a state of feudal anarchy which the Conqueror by his far-sighted policy had striven to prevent. When each of the contending parties had well-nigh reached a state of exhaustion Henry of Anjou, the son of Geoffrey and Matilda, appeared upon the scene as the champion of his own cause. In 1153 Henry came to England, raised a native army,³ and confronted Stephen in the field. But before a decisive battle could be fought, the barons intervened as mediators, and the result was the treaty of Wallingford, through which the evils of the long anarchy were brought to a close. That treaty, in which Stephen was recognized as king and Henry as his heir, was attended by an elaborate project of reform which contemplated among other things the resumption of all royal rights that had been usurped by the baronage,

The oath to
Matilda.

The
Angevin
marriage.

Election of
Stephen;
the civil
war.

Treaty of
Walling-
ford.

¹ *Chron. Petrib.* 1127; *Flor. Wig.* 1126. William of Malmesbury (*Hist. Nov.* 1, 2, 3) says, "Ut si ipse sine haerede masculino decederet, Matildam filiam suam, quondam imperatricem, incunctanter et sine ulla retractione dominam susciperent."

² *Gesta Stephani*, p. 3; *E. Chron.* 1135; Gervase, c. 1340. The reign was ushered in by the issuance of a brief and formal charter. *Statutes of the Realm*, Charters of Liberties, p. 4. In 1136 a second was issued in which distinct promises are made to the three estates. *Select Charters*, p. 120.

³ R. de Monte, 1153.

Death of
Stephen and
accession of
Henry
of Anjou.

the restitution of estates taken from their lawful owners, the razing of all unlicensed castles, the banishment of the foreign mercenaries from the country, and the appointment of sheriffs to reëstablish justice and order.¹ The death of Stephen, within a short time after the pacification, removed the one remaining obstacle from the path of Henry, whose power of combining and adapting all that was useful in the old system of government with all that was desirable and necessary under the new, gave to the policy he initiated in England almost the character of a new creation.

The
period
of fusion.

9. By the coming of William two kindred systems of government and tenure, both tending in the same direction and yet in different stages of development, were brought into the closest contact, and out of the fusion between the two has grown the modern constitution.² The period of growth and transition that intervenes between the ancient constitution and the constitution in its modern form may be divided into two stages: the first or Norman stage, embracing the reigns of the four Norman kings, is the stage during which the great mass of foreign elements and influences were infused into the blood, the language, the laws, the political institutions, of the English nation; the second or Angevin stage, embracing the reigns of Henry II. and his sons, is the stage during which the foreign and native elements were worked together into a new combination that retained the strongest elements of both. The most striking single fact revealed by an analysis of the result is that in the new combination the superstructure is Norman, the substructure Old-English. In reviewing the

Super-
structure
Norman;
substruc-
ture Old-
English.

¹ The treaty itself is preserved in the form of a charter of Stephen, printed in Rymer, i, 18. But the entire scheme of reform which attended it can only be gathered from the contemporary historians. See R. de Monte, 1153; Hen. Hunt., fol. 228; Gervase, 1375; Will. Newberg, 1. 30; Roger of Hoveden, i. 212.

² "The Anglo-Saxon and the Norman institutions had been actually in a state of fusion since the Conquest, and the reign of Henry gave to the united systems the character which has developed into the English constitution." Preface to Benedict, Rolls Series, ii. xxxvi.

first or Norman stage of the transition period, which ends with the death of Stephen, the effort was made to define in general terms the character of the new elements, and the amount of change or innovation introduced during the reigns of the Conqueror and his sons. The fact was then emphasized that while the Norman kings were ever striving to consolidate and strengthen the royal authority, by building up around it a new system of central administration, they were at the same time careful to preserve by express ordinance the ancient customary law of the realm together with the system of local courts in which that law had been immemorially administered. The distinctive feature of the Norman period, so far as constitutional history is concerned, is the development of the new system of central administration with the sources of its strength in the royal authority. In order to discharge the many vast and intricate duties the growth of the royal power after the Conquest concentrated around the person of the king, it became necessary for the crown to organize out of the main body of the great council a smaller body, which could be charged under the king's direction with the whole work of central or national administration.¹ In the time of Henry I. detachments of justices were first sent from the *curia* to assess the revenue and to adjust the business of the exchequer in each shire. In that way the new system of central administration was first brought into direct contact with the local machinery of the constitution. But, excepting the occasional contact that thus arose out of the fiscal visitations of the justices, the central and local systems stood apart during the reigns of the Norman kings. Not until the Angevin period is reached, not until the reigns of Henry II. and his sons, is there anything like a growing together of the Norman system

Distinctive
feature
of Norman
period the
curia regis.

¹ "In conformity with the system of France and other feudal countries, there was one standing council, which assisted the kings of England in the collection and management of their revenue, the administration of justice to suitors, and the dispatch of all public business." Hallam, *Middle Ages*, ii. 317.

Union of
royal and
customary
law.

Origin of
trial jury.

of central administration and the tenacious machinery of Old-English local freedom embodied in the organizations of the township, the hundred, and the shire. The same agencies which, during the Angevin reigns, brought about the amalgamation of the new administrative system and the ancient local machinery, also brought about a union between the new system of royal law, radiating from the *curia regis*, and the ancient system of customary law as administered in the local courts.¹ While keeping that distinction steadily in view, Brunner has demonstrated the fact that out of the union of a certain branch of royal law, in the form of special commissions or writs of inquiry issued from the *curia regis* with a certain kind of community witness proof embedded in the customary law, has been gradually developed the English jury of judgment, the trial jury of modern times.² The Conquest had the effect of uniting the English among themselves. After the time of Stephen, even the threefold division of the kingdom into the Dane law, the West Saxon, and Mercian law became obsolete and disappeared.³ No dividing lines survived except such as were drawn by slight differences in local custom.⁴ Into the greater mass of the united English nation the smaller Norman mass was gradually absorbed, — the conquerors were conquered, the Normans became Englishmen. As early as the reign of Henry I. causes began to work which, before a century had passed by, had drawn together into one nation all natives of the soil, regardless of older differences of race and speech. Under the pressure of common calamities, national enmities were during Stephen's

¹ A great German has clearly pointed out the fact that in the study of Teutonic law the distinction must be sharply drawn between such law as flows from a royal or official source, and such as flows from a customary or popular source. As to Sohm's views on that subject, see *North American Review* for July, 1874, p. 222.

² See *Die Entstehung der Schwurgerichte*, Berlin, 1874.

³ Cf. Simeon of Durham, ed. Hinde, i. 220-222.

⁴ These, Glanvill says, are too numerous to be put on record. *De Legibus*, lib. xii., c. 6.

reign in a great measure forgotten. And through the agency of frequent intermarriage the work of fusion so rapidly advanced that a writer of the time of Henry II. is obliged to confess that, without a careful examination of pedigree, it was impossible to ascertain in his time who was Norman and who was English.¹ As soon as that condition of things was reached in which it was difficult to distinguish an Englishman from a Norman, all legal distinctions in favor of one race against another necessarily passed out of view.² The greatest period of trial through which the English language ever passed began with the Norman Conquest. For a long time after that event the lordly foreign tongue reigned in the castle and the hall, while the humbled native speech reigned in the cottage and the hamlet. But, in the end, the lordly speech passed away, and the English tongue survived with a deep infusion of Romance words. A different story must, however, be told when we look to the struggle between Latin, French, and English in the fields in which laws were made and administered. For a time after the Conquest, English seemed to have a fair chance of holding its own in legal affairs; the two languages which William used for his laws, his charters, and his writs were Latin and English. While many foreign words made their way into Domesday, many Old-English words with definite legal meanings were preserved.³ But during the century that followed when, under Henry II. and his sons, the time came for the regular enrollment of all the king's acts and of all the judgments of his court, Latin became the language of official and judicial records, a position from which it was not dislodged until the year 1731, when it gave place

Fusion
of races.

English
tongue
survived.

Latin in
official and
judicial
records.

¹ "Jam cohabitantibus Anglicis et Normannis, et alterutrum uxores ducen-
tibus vel nubentibus, sic permixtae sunt nationes, ut vix discerni possit hodie, de
liberis loquor, quis Anglicus quis Normannus sit genere." *Dialogus de Scac-*
cario, i., c. 10.

² As to the gradual extinction of Englishry, see Bracton, 135 b; Fleta, lib.
i., c. 30; Bigelow, *Hist. of Procedure*, p. 81.

³ See Maitland, *Domesday Book*, 8.

French
in law
literature.

to English.¹ In the struggle between French and English for the mastery in the domain of legal procedure victory for the former was assured certainly from 1166, the year of the assize of novel disseizin, when it was settled that every man dispossessed of his freehold must seek a remedy in a royal and French-speaking court. From that time the ultimate triumph of French law terms was secure. Legal instruments, in French, rare in the twelfth century, became commoner in the thirteenth and yet commoner in the fourteenth. In the thirteenth century French slowly supplanted Latin as the literary language of the law. The need for French text-books was already felt, and before the century closed it was being met by the book we call Britton, by other tracts, and by the reports of decided cases known as the Year Books. Thenceforward French reigns supreme over such legal literature as there is.² Thus it was that French made an indelible impress upon the entire body of English law. It is hardly too much to say that at the present day almost all English words that have a definite legal import are in a certain sense French words.³

Henry II.
and his
work of
reform.

Upon the death of Stephen in 1154, Henry of Anjou, then in his twenty-second year, came to the throne pledged to the task of bringing peace and prosperity out of anarchy and exhaustion upon the lines of that project of reform that had

¹ Statute 4 Geo. II. c. 26.

² The honor of being the first books concerning English law that were written in the English language probably belongs to some of Sir John Fortescue's treatises, which can hardly be called legal text-books.

³ Contract, agreement, covenant, obligation, debt, condition, bill, note, master, servant, partner, guarantee, tort, trespass, assault, battery, slander, damage, crime, treason, felony, misdemeanor, arson, robbery, burglary, larceny, property, possession, pledge, lien, payment, money, grant, purchase, devise, descent, heir, easement, marriage, guardian, infant, ward, all are French. If we enter a court of justice, court, justices, judges, jurors, counsel, attorneys, clerks, parties, plaintiff, defendant, action, suit, claim, demand, indictment, count, declaration, pleadings, evidence, verdict, conviction, judgment, sentence, appeal, reprieve, pardon, execution; all save the witnesses, writs, and oaths, have French names. See Pollock and Maitland, *History of English Law*, 2d ed., i. 80-87.

followed the treaty of Wallingford.¹ To the complete performance of the work of restoration the first ten years of Henry's reign (1154-1164) were chiefly devoted. During the first three, however, the greater part of the work was actually accomplished. Within that time the feudal party was disarmed, and the *curia regis* and exchequer reestablished, and careful provision made for both central and provincial judicature. When in 1159 he became involved in a foreign war by attempting to enforce the claim of his wife on the county of Toulouse,² he found it highly inconvenient to carry on military operations against the most distant province of France by the aid of feudal levies who were only bound to a limited service. Then it was that Henry hit upon an expedient through which money could be realized for the employment of mercenary soldiers. As a financial measure to aid the meditated expedition against Toulouse,³ Henry and Thomas devised the institution of scutage or shield money, a pecuniary compensation in lieu of military service. The hiring of mercenaries was nothing new, but the device for raising money for their employment was an innovation that dates from this time. Those tenants of the crown who did not desire to go to the war were allowed to pay a tax of two marks on the knight's fee.⁴ The natural supplement to this blow against feudalism was embodied in Henry's assize of arms (1181), whereby the old constitutional force was reorganized by the duty being imposed upon every freeman to provide himself, for the defense of the commonwealth, with arms according to his means.⁵ The full scope of Henry's policy was not only to establish the reign of law, but to reduce all orders of men to a state of equality before the same system of law. The

Scutage or shield money.

Assize of arms.

The reign of law.

¹ Henry did not land in England until December 8, 1154.

² R. de Monte, 1158, 1159 A.D.

³ "Tolosam bello aggressurus," etc. John of Salisb. (Ep. 145), i. 223.

⁴ See Madox, *History of the Exchequer*, ch. 16; Preface to Benedict, ii. xcvi.; Digby, *Law of Real Property*, p. 116.

⁵ *Benedictus*, i. 278; Hoveden, ii. 261; Gervase, c. 1459; *Select Charters*, 153.

Conflict
with clergy.

Constitu-
tions of
Clarendon.

most formidable obstacles that stood in the way of the complete execution of that design were the baronage on the one hand, with their private jurisdictions, and the clergy on the other, with their far-reaching claims of exemption from the ordinary process of the temporal tribunals. Not long after Henry's return from the Continent in 1163 the prosecution of his scheme of reform brought him into conflict with the clerical order, at whose head stood Thomas Becket, who, a year before, had been elevated to the see of Canterbury. From the time of the Conqueror's ordinance separating the spiritual and temporal courts, the punishment of members of the clerical order guilty of criminal offenses had been attended with great difficulty. In such cases the ecclesiastical courts would not allow the lay tribunals to take jurisdiction, and the ecclesiastical courts themselves could only inflict spiritual penalties. That condition of things existed at its height from the beginning of Stephen's reign until the tenth year of Henry the Second. In the hope of settling these and other conflicts Henry called together all the bishops and barons at Clarendon, in 1164,¹ and there renewed his demand that the customs regulating the rights of the church in use in the time of his grandfather should be accepted as the law. The result of the inquiry was embodied in the famous document known as the Constitutions of Clarendon, a concordat which from that time regulated the relations of the church with the state. Its permanent results have been thus summarized: "1. All questions agitated concerning church property were relegated to the king's court, or other lay courts in one form or another. 2. All offenses committed by men in orders upon laymen were to be redressed alone in lay courts. 3. Debts and demands in favor of laymen against clerics were to be sued in the same courts. 4. Redress by clerics against laymen when it was not pursued for the mere punishment of sin was to be sought

¹ R. Diceto, c. 536; Gervase, c. 1385.

in the lay courts. On the other hand, the Court Christian still retained jurisdiction in the following cases: 1. Over offenses between the clergy alone. 2. Over small debts, and perhaps minor property causes between the clergy. 3. Over matrimonial causes, the conduct of the sexes, defamation, usury, and wills. 4. Over, it seems, crimes committed by the laity when jurisdiction was sought for the imposing of ecclesiastical censure, admonition, or penitential punishment. The jurisdiction of the Ecclesiastical Court having thus become settled before the close of the reign of Henry the Second, a way was found to keep that court within the limits fixed, to wit, by means of a writ of prohibition, issued from the king's court, — a writ in use from the time at least of Glanvill, and probably earlier, until the present day.”¹

By the victory won at Clarendon in favor of administrative order, the first period of Henry's reign was brought to a close. The remainder of the reign (1164–1189), so far as constitutional history is concerned, was devoted to the reorganization of the central and provincial systems, and to the task of drawing them into closer relations with each other. The composition of the national council, which was now summoned at regular intervals, was that of a perfect feudal court, — an assembly of archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders.² The constituent members of the assembly are the same as under the Norman kings, but greater prominence and a more definite position are now assigned to the minor tenants-in-chief. But under the changes of form and of name the continuity of the Old-English national assembly went on unbroken. In the days of Henry II., as in the days of Edward and of William, an ordinary meeting of the national assembly embraced only the witan, the magnates of the realm;

Reorgani-
zation of
central and
provincial
systems.

¹ Bigelow, *History of Procedure*, pp. 52, 53.

² *Select Charters*, pp. 22, 23.

Influence
of the
practice of
summons.

Fourteenth
article of
Great
Charter.

while on an extraordinary occasion it might embrace, besides these, not only the tenants-in-chief, but the whole body of freeholders. Through the influence of the practice of summons, to whose origin an exact date cannot be assigned, the tendency was fast gaining ground to limit the national assembly to those only who were summoned by the king's writ, either personally or in a body. The writs of summons were of two kinds; first, such as were specially addressed to those great personages whose presence was necessary, and who were summoned as a matter of course; second, such as were addressed generally to the sheriff of each shire, requiring him to summon in a body the lesser landowners. How far this practice of summons, which was in active operation in the time of Henry II., had developed up to the sixteenth year of the reign of John, can be definitely ascertained from the fourteenth article of the Great Charter, which provides that, "to have the common counsel of the kingdom, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons singly by our letters; and besides we will cause to be summoned in general by our sheriffs and bailiffs all those who hold of us in chief."¹ By that clause, which no doubt expressed the then existing practice, the qualification for membership in the national assembly was at last distinctly defined, and that qualification naturally assumed a feudal shape. No one was expected to attend unless he was summoned; and no one was summoned unless he was a tenant-in-chief. By the form of the summons a line was also distinctly drawn between two definite classes of men, — between the magnates, who were entitled to a personal summons, and the main body of tenants-in-chief, who were summoned generally in the shires: in that way the distinction between

¹ Cap. 14. "Summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per litteras nostras; et praeterea faciemus summoneri in generali, per vici comites et ballivos nostros, omnes illos qui de nobis tenent in capite."

lords and commons begins. Henry II. legislated in the old Teutonic form which had been immemorially employed by his Old-English and Norman predecessors. As Alfred promulgated his code with the counsel and consent of his witan, so Henry legislated with the advice and consent of his national council. The legislative enactments, thus promulgated by the Norman and by some of the Plantagenet kings, assumed many forms before they appeared in the final form of statutes. During the Norman reigns such enactments were usually cast in the form of charters;¹ in the reign of Henry II. they were generally known by the name of assizes,² a word of various application. In the reign of Henry III. legislative enactments appear in the form of provisions;³ in the reigns of Edward I. and his successors they assume the form of statutes.⁴ The ancient form of royal legislation was not, however, superseded by the modern form of national legislation until the ancient council of the king was transformed into a national Parliament.⁵ The statement has been made heretofore that with the imposition of the Danegeld, necessarily a land tax, the history of English taxation really begins. Under the famous rating of 1008, to which can be traced the origin of ship money, the burden of raising a fleet was imposed upon the whole nation, but the proportion to be contributed by each district was fixed by reference to the number of hides contained in each. In the case of the towns, to which the reckoning by hides could not apply, the Danegeld seems to have been compounded for, and the composition or aid thus derived represents no doubt the later talliage. No

Distinction
between
lords and
commons.

Royal
superseded
by national
legislation.

¹ Reeves, *History of England*, i. 478.

² As temporary or tentative enactments they strongly resembled the Frank Capitularies, or, to go farther back, the edicts of the Roman praetors.

³ At that time "Our English lawyers have no philosophy of law, nor have they pursued very far the question, How does law, or a law, come into being?" Pollock and Maitland, i. 174.

⁴ Hallam, *Middle Ages*, iii. 50.

⁵ The legislation of the Great Charter may be considered, to a certain extent, as an attempt, a type, a step in advance towards that consummation.

Ancient
land tax.

Origin of
knight's
fees.

Taxation of
personal
property.

matter whether it is called Danegeld, aid or hidage, carucage,¹ or, in the case of the towns, talliage,² the ancient land tax, originally imposed by Aethelred on the hide, can be surely distinguished. The income from feudal tenures, which accrued to the Norman kings as feudal lords, may be regarded as an addition or supplement to the taxes and dues which grew out of the ancient constitution. The new military service that arose out of the development of tenures was probably measured at first by the existing custom which imposed the equipment of one fully armed man upon every five hides of land.³ By degrees the older system based upon the hide was gradually superseded by a new division of the land into knight's fees, and by the fixing of the knight's fee to a particular amount of land. Up to that point in Henry's reign — leaving out of view the receipts from the customs — *all taxation fell upon the land*, and consisted (1) of the ancient customary dues, and the tax on the hide, — survivals of the Old-English system; and (2) of the feudal incidents, and the scutage, or tax on the knight's fee, — products of the new system of military tenures. The growth of national prosperity, and the consequent development of material wealth, consequent upon Henry's policy of order and reform, rapidly brought into existence a mass of personal property which presented to the Angevin financiers a new and tempting basis of taxation capable of unlimited expansion. By the Assize of 1181, in which each freeman was required to equip himself with arms according to his means, and in which local jurors were required to determine on oath the liability of each,

¹ For a definition of the "carucate, or land of a plow-team, used instead of the hide for later taxation," see Seebohm, *English Village Community*, p. 40.

² Cf. Madox, *History of the Exchequer*, p. 480; *Blackstone's Commentary*, i. 310 (Sharswood ed.).

³ "Si rex mittebat alicubi exercitum, de quinque hidis tantum unus miles ibat, et ad ejus victum vel stipendium de unaquaque hida dabantur ei iiii. solidi ad duos menses." *Domesday* (Customs of Berkshire), i. 56. See also Digby, *Law of Real Property*, p. 35.

a move was made towards the taxation of rent and chattels.¹ Seven years later Henry took the final step and brought taxation directly to bear upon personal property by decreeing with the authority of a great council at Geddington a tithe of a tenth of movables to aid the common host of Christendom in the retaking of the Holy City from Saladin. In order fairly to assess each man's liability to the tithe, Henry resorted to his favorite institution of inquest by the oaths of local jurors.² In the reign of Richard I., when the Danegeld was revived under the name of carucage, the new principle of jury assessment was applied in a general way to the assessment of all lands subject to the tax.³ In that way the representative principle — which first appears in the form of the reeve and four selectmen who represent the township in the courts of the shire and hundred — is brought into close contact with the system of taxation. It is first applied in an humble way through the chosen jurors to the assessment of the tax; it next becomes involved with the granting of the tax; and, finally, it determines the method of its expenditure. As successors of the Old-English kings, the Norman and Angevin rulers retained the right to summon, under the lead of the sheriffs, the ancient forces of the shires; as feudal lords, they gained the right through the growth of tenures to call upon the feudal array to perform military service due from their lands. As the fruits of feudal tenures were an addition or supplement to the older revenues derived from the ancient system, so the feudal army was an addition or supplement to the older constitutional force of the land. Through the results of Henry's legal reforms, which tended to centralize to the utmost the administration of justice, the financial aspect of the *curia*

Taxation
and repre-
sentation.

Relation
of the
feudal
array to the
ancient
force.

¹ See article 9 of the Assize, *Select Charters*, p. 154.

² "Et si aliquis juxta conscientiam illorum minus dederit quam debuerit, eligentur de parochia quatuor vel sex viri legitimi, qui jurati dicant quantitatem illam quam ille debuisset dixisse; et tunc oportebit illum superaddere quod minus dedit." *Benedictus*, ii. 31.

³ Hoveden, iv. 46 sq.

Growth of
judicial
business.

regis was overshadowed by its development as a judicial tribunal. During the twelve years (1164–1176) of legislative reform that followed the adoption of the Constitutions of Clarendon, the growth of the judicial business of the *curia* seems to have been so great that in 1176 its staff had increased to eighteen justices, who were apportioned to the six circuits into which the kingdom was then divided. In 1178 this staff, which was found to be too large, was reduced to five judges, who “are to hear all the complaints of the kingdom and to do right, and not to depart from the *curia regis*.” In the following year a new arrangement was made, and out of a larger staff, charged with exchequer business and the work of the circuits, six justices instead of five were selected, and “these six are the justices constituted in the *curia regis* to hear the complaints of the people.”¹ This limited tribunal, which from the year 1179 held regular sessions “*in banco*,”²

Beginning
of the
king's bench
as a distinct
tribunal.

probably represents the beginning of the king's bench as a distinct tribunal. Its sessions are still held nominally but not actually “*coram rege*,” and before it is brought all of the business which came at a later period before the courts of king's bench, exchequer, and common pleas. But neither the special tribunal nor the courts to which it gave birth were courts of the last resort: all causes too difficult for the justices were reserved for the decision of the king in his ordinary council, a body from which at a later date the jurisdiction of the chancellor and the judicial functions of the privy council emerge. As to the history of the exchequer in the time of Henry II. we have, in addition to the Pipe Rolls, the *Dialogus de Scaccario*,³ written no doubt by Richard Fitz Neal, while, as to the procedure of the *curia regis*, we

The
exchequer.

¹ “Isti sex sunt justitie in curia regis constituti ad audiendum clamores populi.” *Benedictus*, i. 239.

² As to the “Justiciarii sedentes in banco,” see Granvill, lib. 2, c. 6, lib. 8, c. 1, and lib. 11, c. 1; *Benedictus*, vol. ii., preface, 75, Rolls Series.

³ It is printed by Madox in his *History of the Exchequer*, and has been fully discussed by Liebermann, *Einleitung in den Dialogus de Scaccario*.

have the famous treatise, attributed to the chief justiciar, Ranulf Glanvill, *Tractatus de Legibus et Consuetudinibus Regni Angliae*.¹

In 1166 Henry, with the traditional counsel and consent, issued the Assize of Clarendon,² said to be the most important document, of the nature of law or edict, that had appeared since the Conquest. The two leading objects of this Assize, whose enforcement was committed to the justices itinerant, were to remodel the system for the presentment of criminals, and to advance the king's anti-feudal policy by opening every franchise to the visits of the sheriffs and justices. The manner in which criminal accusations were made in the popular courts, prior to the Assize of Clarendon, is a subject wrapped in much obscurity and confusion. It may, however, be reasonably inferred from the ancient laws that, in the pre-Norman period, such accusations were made either by a private accuser, by the reeve and four men of the township, or more often perhaps by the twelve senior thegns in each hundred or wapentake,³ who went out, and the reeve with them, to "swear on the relic that is given them in hand, that they will accuse no innocent man, nor conceal any guilty one."⁴ There is reason to believe that after the Conquest, in the absence of a private accuser, it was generally left to the common voice of the neighborhood to make the accusation and denounce the suspected person.⁵ A leading object of the Assize of

Assize of
Clarendon.

Accusations
in pre-
Norman
period.

After the
Conquest.

¹ In the thirteenth century the book was already known as "Summa quae vocatur Glanville." Maitland, *Glanvill Revised*, *Harvard Law Review*, vi. 1. As to the author's knowledge of Roman and canon law, see Pollock and Maitland's *History of English Law*, i. 165 sq.

² For the text of the Assize, see MS. Bodl. Rawlinson, c. 641; *Select Charters*, p. 143.

³ Sir J. F. Stephen, *History of Criminal Law of England*, i. 68; Palgrave, *Commonwealth*, i. 213. Palgrave infers that the reeve and four men had the power of accusation from a passage in a law of Cnut. See Thorpe, *Ancient Laws*, i. 393.

⁴ *Laws of Aethelred*, iii. 3, in Thorpe, vol. i., pp. 294, 295. See Brunner, *Die Entstehung der Schwurgerichte*, pp. 402, 404.

⁵ Forsyth, *Trial by Jury*, p. 160.

The
ordeal.

Assize of
Northamp-
ton.

Grand
juries of
Richard I.

Clarendon was to provide a definite system for the presentment of all persons accused of felony by public report to the courts of the sheriffs or justices. All who were presented by the inquest were required to go to the ordeal, which seems to have been substituted for the usual method of trial by compurgation.¹ If they failed to stand the test of the ordeal, they were required to accept the legal punishment; if they were successful, they were even then required to abjure the realm, provided they had been accused of any grievous felony by the public voice of the neighborhood.² In 1176 the Clarendon Assize was reissued as the Assize of Northampton, "in the form of instructions to the six committees of the judges who were to visit the circuits" then marked out for them.³ In the reign of Richard I., Henry's scheme of presentment was reorganized and reestablished upon a basis more distinctly representative. Under the new arrangement "four knights are to be chosen from the whole county, who, by their oaths, shall choose two lawful knights of each hundred or wapentake and those two shall choose upon oath ten knights of each hundred or wapentake, or if knights be wanting, legal and free men, so that these twelve may answer under all heads concerning their whole hundred or wapentake." The presentment juries thus chosen were limited to the cognizance of offenses committed within their own hundreds. In what is said to be the oldest judicial record in existence are contained several illustrations of the manner in which such prosecutions were conducted. From the "Roll of the Iter of Stafford in 5 John," we learn that "Andrew of Bureweston is suspected by the jurors of the death of one Hervicus because he fled from his death; therefore, let him purge himself by the judg-

¹ Art. 4. "Ibi ante Justiciam facient legem suam." Cf. Bigelow, *History of Procedure*, pp. 297, 323.

² Art. 14. Cf. Stephen, *History of the Criminal Law*, i. 251.

³ *Benedictus*, i. 108; Hoveden, ii. 89 sq. "The two assizes regulate the inquisitions to be held by the king's judges in every shire and in every hundred, without regard to local privileges." Freeman, *Norman Conquest*, v. 454.

ment of water.”¹ After the decree of the Lateran Council (1215) forbidding it, trial by ordeal became obsolete, and the petty jury gradually took its place as a body before whom the truth of the presentment of the grand jury could be finally determined. Thus it was that a form of trial, first introduced in civil suits involving the right to land, was introduced into criminal proceedings.² It is difficult to determine the exact point of time when a second and different jury came into general use as a tribunal before which could be tried the truth of the presentment made by the first. That result seems certainly to have been reached by the end of the thirteenth century.³ And here the fact must be borne in mind that at the time of their introduction, and for a long time thereafter, the jurors who were allowed to disprove or sustain the accusation made by the jury of presentment were nothing but witnesses. They were therefore summoned from the hundred in which the crime was supposed to have been committed, for the reason that personal knowledge of the facts was an indispensable qualification. If any of the jurors chosen were uninformed of the matters as to which they were to swear, those who were informed were added to or afforced until at least twelve were found who could agree in a definite conclusion in favor of guilt or innocence. By degrees this clumsy system was improved by separating the informed or afforcing jurors from the uninformed jurors, who, after being relieved of their character as witnesses, became judges of evidence detailed by other persons.⁴ By the end of the fifteenth century the

Ordeal
superseded
by petty
jury in crim-
inal cases.

Jurors at
first only
witnesses.

Finally
judges of
facts
detailed by
others.

¹ This entry is from the *Rotuli Curiae Regis* for the reigns of Richard and John, and is published in his *Proofs and Illustrations*, by Sir Francis Palgrave, clxxxv-clxxxviii.

² As to the right of the court to force the new method of trial upon a prisoner who did not request it, by the proceeding known as *peine forte et dure*, see Palgrave, *English Commonwealth*, i. 268-270; ii. 189-191.

³ Britton wrote, it is supposed, about 1291-1292. "In his time there certainly were two juries, and each was composed of witnesses." Stephen, *History of the Criminal Law*, i. 258.

⁴ As to the history of that process, see Forsyth, *Trial by Jury*, pp. 199 sq.

Trial by
battle.

evolution is complete,¹ and the result is the criminal jury of judgment, the trial jury of modern times. To the jury of presentment trial by battle stood in a perfectly independent relation, for the reason that it could only be invoked upon the accusation of an individual accuser, and such an accuser could make his "appeal" not only after indictment for the offense, but after trial and acquittal had been made upon it. Not until the thirteenth century do we find a complete history of the procedure in Bracton, who is the great authority on the subject.² This method of trial seems to have been the usual and established way of prosecuting murder down to the close of the fifteenth century. As late as the years 1768 and 1774 attempts to abolish appeals for murder by statute were unsuccessful. The last appeal of murder brought in England was the case of *Ashford v. Thornton* in 1818,³ a proceeding that led to the statute of 59 Geo. III., c. 46, by which all appeals in criminal cases were finally abolished.

Origin of
jury trials
in civil
cases.

The circumstances having now been stated under which the petty jury — a form of trial first introduced in civil cases in suits involving the right to land — was gradually employed in criminal proceedings as a method of trying accusations presented by grand juries, an account must be given of its origin as a method of trial in civil suits. The primitive Teutonic suit was a simple demand made by the actor on the defendant for compensation.⁴ The vitally important part of

¹ That is a reasonable inference from the account given by Sir John Fortescue, in his *De Laudibus Legum Angliæ*, which must have been written between 1460 and 1470. How jurors are informed by evidence is made plain, so far as civil cases are concerned, in ch. xxvi., p. 89 (Clermont ed.).

² Bracton, ii. 425 sq. See Güterbock, *Henricus de Bracton*; Scrutton, *Roman Law in England*; Bracton and Azo (Selden Soc.). "Bracton's book is the crown and flower of English medieval jurisprudence." Pollock and Maitland, *History of English Law*, i. 206.

³ 1 Bar. and Ald. 405, a case argued by Mr. Chitty and Sir N. Tindal. The great authority relied on was Bracton. The court recognized the legality of the proceedings and admitted the appellee's right to wage his body; but as the appellant was not prepared to fight, the case ended upon a plea of *autrefois acquit* interposed by Thornton.

⁴ See *Essays in Anglo-Saxon Law*, p. 183.

the procedure, conducted throughout with an iron rigorism of form, was the question of proof. After the issue was made up the proof-judgment determined what kind of proof should be given, and at what time it should be given.¹ Four distinct means of proof were known to the customary law, — compurgation, witnesses, documents, and ordeal, to which, after the Conquest, was added trial by battle. After that innovation the issue was made up and the proof-judgment rendered as before, and in such judgment the court determined as of old, according to the circumstances of each case, whether the trial should be by compurgation, by witnesses, by documents, by ordeal, or by battle. The witnesses of the customary law were either transaction witnesses, in the nature of official persons,² and community witnesses, who, by their long acquaintance with the locality, could testify as to long continued relations, and circumstances known to them as neighbors or members of the community. Such witnesses could only appear before the court when produced by the party required to make proof, and they swore only to the truth of the assertion made by their chief;³ they were neither required nor allowed to respond to interrogatories propounded either by the parties or by the court itself.⁴ The inquest of proof (*inquisitio per testes*) was introduced into England by the Normans, who derived it directly from the Frank capitularies, into which it was probably adopted from the fiscal

Four means
of proof
known to
customary
law.

Inquest
of proof.

¹ Brunner, *Entstehung der Schwurgerichte*, p. 44; Siegel, *Gerichtsverfahren*, p. 148.

² Aethelstan, v. 1, § 5. "And let there be named in every reeve's 'manung' as many men as are known to be unlying, that they may be for witness in every suit. And be the oaths of these unlying men according to the worth of the property, without election." *Select Charters*, p. 66. It was their business to witness sales, gifts, exchanges, and the like. By Eadgar's law, a given number of such witnesses were appointed in each burg and hundred. Eadgar, iv., §§ 4, 5, 6.

³ Brunner, *Schwurgerichte*, pp. 50-53.

⁴ "The proof was regarded as a satisfaction to the claimant, and therefore was not directed to the court, but to the opponent." *Essays in Anglo-Saxon Law*, p. 188.

regulations of the Code of Theodosius.¹ The inquest, in its Frankish form, consisted of special commissions issued by the kings to their *missi*, commanding them to make inquiry into fiscal and judicial matters in the local courts by the oaths of sworn witnesses who were required to respond to interrogatories propounded by the judge himself.² Throughout the Norman period it seems to have been the constant practice to apply this system of inquest, in suits involving the right to land, by appealing to the knowledge of the community in which the parties resided and the land lay.³ The writ which authorized the holding of such an inquest was an instrument of royal law, while the community witnesses who responded to the inquiry represented a form of witness proof which finds its origin in the customary law. But the old customary witnesses now appear in a new relation: they are no longer jurors who swear only to the assertion of their chief; they are sworn men (*jurati*), who, being emancipated from the ancient rigorism of form, answer upon their oath such questions as are propounded to them by the officer charged with the execution of the inquiry. Thus under the influence of the writ process the community witnesses of the customary law were developed into the community *jurata*, whose existence in England is clear from the time of the Conquest.⁴ Beyond that stage, in which the recognitors or jurors were mere witnesses, the Norman jury did not advance.⁵ During the reign of Henry II. there was introduced into England a new species of inquest of proof known as the recognition.⁶ The distinc-

An instru-
ment of
royal law.

The
community
jurata.

¹ Brunner, *Schwurgerichte*, p. 87, citing Cod. Theod., x. 10. l. 11; *Ibid.*, l. 29.

² The roots of the Frankish inquest of proof "are not to be found in the customary or folk law; it is a creation of new or royal law." *North American Review*, July, 1884, p. 220.

³ Forsyth, *Trial by Jury*, p. 108.

⁴ Bigelow, *History of Procedure*, p. 337.

⁵ In Normandy, as well as in the rest of France, the whole system of inquest by proof was gradually superseded by the French *enquête*, a procedure partly Roman, partly canonical. *North American Review*, July, 1874, p. 221.

⁶ Brunner, *Schwurgerichte*, pp. 303, 304.

tion between a simple inquisition and a recognition was that the former consisted of an inquiry into a disputed allegation conducted by a judge or other royal officer, who propounded interrogations to an indefinite number of witnesses taken from the body of the local court, while the latter consisted of an inquiry made by a definite body of chosen witnesses, who, after being duly chosen, were summoned by an officer of the law to make inquiry into the matter in dispute, and then to report (*recognoscere*) the truth to the court itself.¹ Their duty was not *judicia facere*, but *recognoscere veritatem*. In a simple inquisition the witnesses were a part of the court and as such were interrogated by the judge, while the recognitors sat apart from the court and conducted their own inquiry as a distinct body, that stood between the parties and the judge.² The report of the recognitors was based on their own knowledge, and by knowledge, says Glanvill, was meant what they had seen or heard from reliable sources.³ The most authoritative view is that Henry II., who is supposed to have introduced the *recognitiones* into Normandy between 1150 and 1152, introduced them into England, upon his accession, under the name of assizes. To the student of English law, the Great Assize, and the assizes of *novel disseizin*, *mort d'ancestor*, and *darrien presentment*, the leading recognitions in civil matters, are the most familiar. The primary object of the Great Assize, as described by Glanvill, was to furnish to those assailed in their freeholds a reasonable and equitable method of trial by witnesses taken from the neighborhood in lieu of trial by battle. The proceedings in the other assizes

Recogni-
tions
defined.

Introduced
by Henry
II. as
assizes.

¹ Bigelow, *History of Procedure*, p. 175, note 4, pp. 335, 336.

² The community witnesses now appear as the sworn recognitors of the assize. "Soweit nach älterem Rechte ein Gemeindezeugniss, sei es in den Formen des fränkisch-normannischen oder des angelsächsischen Verfahrens in Anwendung war, hat dasselbe unter dem Einflusse der Recognitionen und der Königsgerichtlichen Praxis allmählich den Charakter einer Inquisitio ex jure angenommen." Brunner, *Schwurgerichte*, p. 382.

³ Glanvill, lib. 2, c. 17, § 4.

were substantially the same, with the exception that the sheriff himself selected the twelve recognitors without the intervention of the four lawful knights of the Great Assize.¹ It required the concurrent testimony or verdict of twelve witnesses or recognitors to be conclusive of the right.² If any of the jurors were uninformed as to the matter concerning which they were to swear, those who were informed were added to or afforced until at least twelve were found who could unite in a definite conclusion in favor of one side or the other. By degrees this clumsy system, as stated already, was improved by separating the afforcing jurors from the uninformed jurors, who, being thus relieved altogether of their character as witnesses, became judges of evidence detailed by others. From the account given of juries by Fortescue in his treatise, written between 1460 and 1470, it is quite clear that this final stage in the development of the trial jury in civil cases must have been reached by the middle of the fifteenth century. Rather by the silent force of its own intrinsic excellence than by the artificial stimulus of legislation, trial by jury gradually exterminated all other methods of trial ever employed in England for the settlement of issues in which disputed facts were in question. By the force of the law of natural selection it outlived them all, — as the fittest it survived. And so as all other methods of trial gradually fell into disuse, and as the king's courts held in the shires were gradually relieved of all fiscal and administrative work, the county parliaments, originally convened to meet the itinerant justices, were slowly transformed into the modern courts of assize,³ in which the itinerant justices still preside, but in which the general

Fortescue's
description
of jury
system.

As the
fittest it
survived.

¹ Glanvill, lib. xiii., cc. i. 2 sq.; Reeves, *History of English Law*, i. 443, Pollock and Maitland, *History of English Law*, i. 144–149.

² And no subsequent action could be brought on the same claim. Glanvill, lib. ii., c. 18.

³ As to the distinction between such courts of assize and the ancient county courts which met from month to month, see Taylor, *The Origin and Growth of the English Constitution*, i. 319, 320.

assembly of the shire is represented only by the grand and petty jurors summoned by the sheriff for the dispatch of the civil and criminal business to be disposed of.

10. From what has now been said it clearly appears that the vast powers consolidated in the hands of the crown through the centralization of finance were soon augmented by the centralization of justice. Not until the principle was firmly established that the king was the fountain of justice and that all courts were the king's court, did it become possible for the king to invade with his writ any jurisdiction and to withdraw from it any cause whatsoever. Through the instrumentality of the Norman writ process in its various forms, the *curia regis* persistently encroached upon the popular and franchise courts until the main body of the judicial business was finally withdrawn from them into the royal tribunals. This vast concentration of powers around the person of the king, this constant withdrawal of jurisdiction from the local and popular courts into a single central and royal court, naturally and necessarily resulted in the vesting in the Norman system of central administration as embodied in the crown and abnormal preponderance both in power and authority. Out of that condition of things arose the gravest political problem to which the constitutional growth of the English nation has given birth. That problem was so to limit the royal authority, so to combine the vigorous Norman system of central administration with the laxer system of Old-English local freedom, as to preserve the counterpoise between the two, and at the same time retain in the new combination the strongest elements of both. In the effort to work out that result the prolonged and bitter struggle for the charters had its birth. That struggle did not grow out of any vague apprehension of possible evils that might arise out of the unequal adjustment of the Norman central system to the Old-English system of local freedom embodied in the township, the hun-

The winning
of the
charters.

Encroach-
ments of the
curia regis.

Origin of
the struggle
for the
charters.

dred, and the shire. Neither did it grow out of the mere possession, by wise and politic princes of the type of Henry I. and his grandson Henry II., of vast and unlimited powers never deliberately employed for purposes of oppression merely. Not until the grinding weight of the central and royal authority was actually and wantonly applied by careless despots to the oppression of all classes and conditions of men did the collective people, in the persons of the three estates, rise up as one man to grapple with the crown in a struggle for the establishment of rights which were made eternal. The two parties to the contest are, therefore, the central or royal authority, on the one hand, and the nation, marshaled in the ranks of the three estates, on the other.

Parties to
the conflict.

Growth of
the estate
system.

The causes that brought about the establishment of the estate system were general in their operation, and in each of the European countries the result was reached about the same time, the thirteenth century. During that period was established in Europe that type of a national assembly into which the several classes or orders of society entered in the form of definitely organized estates. The estate system itself consisted of the division of a nation into definite classes or orders of men; the outcome of the system was that type of a national assembly in which each class or order appeared in person or by representatives. In each country the system has its special or local history, but as a general rule in all the European constitutions the three political factors are arranged upon substantially the same principle. In the history of the English nation the three estates appear as the clergy, the baronage, and the commons, and not, as is often erroneously stated, as the king, lords, and commons.¹ According to no medieval theory of government could the king be considered an estate of the realm. As Chancellor Stilling-

Clergy,
baronage,
and
commons.

¹ An argument in favor of that now obsolete view may be found in White-
locke's work on the *Parliamentary Writ*, ii. 43.

ton quaintly expressed it, in the 7th of Edward IV., "This land standeth by three estates, and above that one principal, that is, to wit, lords spiritual, lords temporal, and commons, and over that state royal, as our sovereign lord the king."¹

A review has been made already of the policy of William and Lanfranc that resulted in the establishment in England of a distinct system of ecclesiastical courts and councils in which the church could judge and legislate upon its own affairs free from secular interference, so long as it keeps within certain limits imposed by the royal authority.²

Ecclesiastically England is divided into the two provinces of Canterbury and York, whose subdivisions closely coincide with the subdivisions of the kingdom itself. As the shire is the largest and most important division of the kingdom, so the diocese is the largest and most important division of the province. And as the shire moots were the most important local courts in the kingdom, so the diocesan councils were the most important local courts in the church. As out of the ancient county court held by the king's judges in the shire was slowly developed the modern court of assize, so out of the diocesan council was developed by a process whose history is somewhat obscure the consistory court held by each diocesan bishop for the trial of all ecclesiastical causes arising in the diocese.³ The subdivisions of the diocese roughly correspond with those of the county. As each county is divided into hundreds, and each hundred into townships, so each diocese is divided into archdioceses,

Ecclesiastical divisions and courts.

Diocese and county.

¹ *Rot. Parl.* v. 622. The treaty of Staples, in 1492, was to be confirmed "per tres status regni Angliæ ritè et debitè convocatos, videlicet per prelatos et clerum, nobiles, et communiales ejusdem regni." Rymer, xiii. 508. "In England . . . the clergy have been esteemed one estate, the peers of the realm the second estate, and the commons of the realm, represented in parliament by persons chosen by certain electors, the third estate." *Lords' Report*, i. 118.

² See above, p. 255 sq.

³ "The history of the development of these councils, and of the settlement of their judicial functions, resulting in a fixed tribunal of the English constitution, is very obscure." Bigelow, *History of Procedure*, p. 28.

Election
of bishops.

each archdiocese into rural deaneries, and each deanery into parishes.¹ The unit of organization in each is the same, — the parish, as a general rule, simply represents the township in its ecclesiastical aspect. Not until the reign of Henry I. did the right to elect the bishops finally pass from the king and witan to the chapters of the cathedral churches, coupled with a serious limitation in favor of the royal authority.² It was required that the choice of the chapter should be preceded by the royal license, and that it should be followed by the presentment of the bishop-elect for the royal approval. The necessity for the royal license preserved in substance to the crown the right of nomination. This right of canonical election, confirmed by Stephen at his accession,³ and recognized in turn by Henry II. and Richard I., was finally confirmed by John in a charter issued to the church a short time before the granting of the Great Charter itself.⁴ But even after his election by the cathedral chapter an archbishop could not consider himself fully inducted into office until his right had been finally confirmed by the see of Rome.⁵

Estate of
the peerage
identical
with House
of Lords.

From the reign of Edward I. the estate of the baronage or peerage has been identical with the House of Lords.⁶ The hereditary and official councilors of the crown who constitute the upper house of Parliament represent the entire estate of the baronage, — they do not represent a wider noble class or caste of which they themselves are but a part.

¹ As to the relations between the parish and township, see Taylor, *The Origin and Growth of the English Constitution*, i. 143 sq.

² The struggle between Henry I. and Anselm on the question of investitures ended in a compromise that placed the election in the hands of the chapters of the cathedrals.

³ For Stephen's charter, see *Statutes of the Realm*, Charters of Liberties, p. 3.

⁴ For John's charter, see *Ibid.*, p. 5.

⁵ In early times an archbishop was expected to be invested with the pallium at Rome. Lingard, *Anglo-Saxon Church*, p. 205. Gregory and his immediate successors excused the English metropolitans from so long a journey and sent the pall by messengers. Wilkins, *Concilia*, pp. 32, 35. See also Stubbs, *Registrum Sacrum Anglicanum*, pp. 140, 141.

⁶ *Lords' Report*, i. 390.

The only nobleman known to English law is he who holds the hereditary office of a peer. The right to inherit such an office the law concedes to the peer's eldest son, but it concedes no other right to his children.¹ After the transformation of the ancient assembly into the king's court of feudal vassals, the practice of summons finally settled the fact that no one was to attend unless he was summoned, and no one was summoned unless he was a tenant-in-chief. The greater tenants-in-chief, who received personal summons, and whose right to receive the same became hereditary, represent, together with the lords spiritual, the peerage of England.² Every peer, whether temporal or spiritual, holds, or is supposed to hold, an ancient barony directly of the king.³ Under the system of feudal law which Flambard seems to have worked into a definite shape, the bishops and abbots were made to assume the relation of tenants-in-chief, holding baronies of the crown "*sicut barones ceteri*," and in that way the idea grew up that bishops and abbots sat in Parliament by virtue of their baronial tenure only.⁴ But the sounder view seems to be that, as a part of the witan of the realm, the prelates never lost their immemorial right to sit in the national assembly. To this right was simply added the new right growing out of their feudal relations; the title of "*barones*" was simply added to that of "*sapientes*."⁵

Status of
bishops and
abbots.

If we subtract from the English nation as constituted in the thirteenth century the estate of the clergy and the estate

¹ The theory that mere nobility of blood conveys political rights or privileges has never been recognized in the English system.

² No reference is here made to life peerages.

³ But the simple holding of a barony was not of itself a sufficient ground for requiring attendance in Parliament; a writ of summons did not necessarily follow tenure by barony. *Lords' Report*, i. 326, 342. As to the elements necessary to constitute the baronial honor or estate, see Hallam, *M. A.*, iii. 9, 117; Stubbs, *Constitutional History*, ii. 178; Selden, *Works*, iii. 178; Madox, *Baronia Anglica*. No precise or satisfactory definition of a barony has resulted from these inquiries.

⁴ For that view, see *Lords' Report*, i. 393.

⁵ Hody, *History of Convocations*, p. 126; Freeman, *Norman Conquest*, v. 279.

Estate
of the
commons.

of the baronage, the remainder represents, although in a very vague and general sense, the third estate, — the estate of the commons, — a term which in England has always embraced not only freemen incorporated in towns, but freemen incorporated in shires. There the commonalty as organized in shires were the first to send delegates to Parliament in the persons of the knights of the shire, representatives of the lesser landholders, who, after severing themselves from the baronage, united upon equal terms with the representatives of the towns in the formation of the third estate. That estate thus acquired in England a vital element of strength which in continental lands it did not possess.¹

Pressure
of royal
authority
under
Richard I.

With the wanton and irritating pressure of the royal authority upon every class in the reign of Richard I., the struggle for the charters really begins. From a constitutional standpoint the reign of Richard I. is chiefly interesting in so far as it illustrates the improvements in the system of taxation suggested by its constant use, and the oppressions that arose out of its incessant application to all classes and conditions of men. In 1192 Richard demanded for his ransom £100,000, double the revenue of his kingdom.² In 1196 it was that the poorer citizens of London broke into open revolt at the manner in which the tallage was collected;³ and two years later a fresh demand for money from the baronage led

¹ In medieval times the "commons" on the Continent were understood to embrace only the citizens of privileged towns, or of chartered communities of kindred municipal origin. As to France, cf. Thierry, *History of the Tiers-État*, i. 56 (English translation); Savaron, *États généraux*, p. 74. As to Spain, cf. Schäfer, *Spanien*, iii. 215, 218; Zurita, i. fol. 71, 74. On the Aragonese cortes, see Hallam, *Middle Ages*, ii. 58, and notes. The term "commons" originally bore the same meaning in the constitution of Scotland. As to the change made in that constitution in 1427, whereby commissioners of shires were permitted to appear in Parliament as the representatives of the minor tenants-in-chief, see *Lords' Report*, i. 111-124.

² Hoveden, iii. 208, 210, 217, 222; see also *Preface to Hoveden*, iv., lxxxiii., Rolls Series.

³ For the history of the rising, see Will. Newb. v., c. 20; R. Diceto, c. 691; Hoveden, iv. 5 and 6, and *Preface*, iv., lxxxix.

to a revolt in a higher sphere.¹ In that year opposition upon the part of the religious houses to oppressive taxation brought upon the clergy a royal proclamation by which they were practically outlawed.² The accession of John in 1199 and the loss of Normandy in 1204 quickened the pace of events. With the conquest of Normandy by Philip, the last direct connection of the baronage of England with the land of their fathers passed forever away. This complete severance of all connection with the Continent, whereby the barons of Norman descent who had grown up on English ground were finally transformed into Englishmen,³ was the completion of the great work that had been steadily going on since the Conquest, the work of building up a united English nation, at whose head stood the baronage throughout the prolonged struggle in which the Great Charter was won. The constitutional struggle opens with the famous quarrel which brought John into conflict not only with the clergy of his own realm, but with the greatest of all the popes, — Innocent III. With the consecration of Langton the trial of strength between the pope and the king actively begins. On the day appointed, March 23, 1208, the threatened interdict fell upon the land,⁴ and John in his wrath banished the bishops who had proclaimed it, and confiscated the estates of those of the clergy who observed it. Thus ended in anger that long alliance between king and clergy which William and Lanfranc had built up, and which the quarrels of Anselm and of Thomas had never completely broken down. The church, so long

Accession
of John and
loss of
Normandy.

John and
Innocent
III.

¹ As to the constitutional importance of that event, see *Preface to Hoveden*, iv., lxxxi.; Freeman, *Norman Conquest*, v. 465.

² The clergy opposed the extension to them of a carucage upon the lands of the freeholders at the heavy rate of five shillings on each carucate or hide. Hoveden, iv. 46.

³ Families that still retained estates on both sides of the Channel either split into two branches, each of which made terms for itself, or, renouncing their interest in one kingdom, cast their fortunes with the other. Hallam, *Middle Ages*, iii. 154.

⁴ M. Paris, ii. 115, 116.

John
and the
baronage.

the steadfast support of the crown against the baronage, was now changed from a faithful ally into a dangerous enemy. The defection of the baronage, which had crushed John's hopes in the presence of Philip, still stood as a menace before him. The breach originally opened by the king's faithlessness was widened and deepened in each succeeding year by the shameless pressure of taxation, by acts of wanton despotism in individual cases, and by a number of lustful assaults upon the honor of the proudest of the baronial families.¹ Open resistance on the part of the nobles begins with their refusal in the summer of 1213 to follow John to France upon the ground that he was still excommunicated. In a storm of rage at their defiance, John, on the 25th of August, marched rapidly northward to force them to submission.² Three weeks prior to that time, a memorable council was held at St. Alban's, to which were summoned not only the bishops and barons, but also the reeve and four legal men as representatives from each township on the royal demesne.³ This gathering, although called simply to assess the damages due to the church, assumed in its deliberations a far wider scope. The laws of Henry I. — the embodiment of the laws of King Eadward as amended by King William — were brought to the attention of the assembly by the justiciar Geoffrey Fitz-Peter, and proclaimed as the basis upon which the liberties of the nation were to be reëstablished.⁴ In a second gathering of the barons held at St. Paul's in London

Council at
St. Alban's,
August 4,
1213.

Council at
St. Paul's,
August 25.

¹ "The licentiousness of his amours is reckoned by every ancient writer among the principal causes of the alienation of his barons." Lingard, ii. 78.

² Langton reminded him that he had no right to make war on them until they had first been heard in the king's court. "Si absque judicio curiae suae contra quempiam, nedum suos homines geniales, bellum moveret." M. Paris, ii. 142.

³ "In crastino autem misit rex litteras ad omnes vicecomites regni Angliae, praeciens ut de singulis dominicorum suorum villis quatuor legales homines cum praeposito capud Sanctum Albanum pridie nonas Augusti facerent convenire." M. Paris (ed. Wats), p. 239.

⁴ "Quatenus leges Henrici avi sui ab omnibus in regno custodirentur, et omnes leges iniquae penitus enervarentur." M. Paris, *Ibid.*, p. 239.

on the 25th of the same month, Langton produced and read the charter of Henry I., which was warmly accepted as the basis of national action.¹ The claims of the council of St. Alban's and St. Paul's were laid before the king by the judiciar, who died almost immediately thereafter,² leaving the guidance of the baronage to Langton, under whose leadership they united, upon the basis of Henry's charter, in an open demand for a definite and positive scheme of national reform. In November, 1214, the barons, under pretext of a pilgrimage, assembled secretly at the abbey of St. Edmund for the purpose of casting into a final shape the schedule of liberties they had resolved to force upon the king. Early in January, 1215, the united baronage met in arms, and on May the 24th London threw open her gates to the patriot host, and Exeter and Lincoln followed her example. In order to save himself from the final humiliation of unconditional surrender, John attempted to conceal the real nature of the submission about to be made under the cloak of a negotiation. With that end in view he invited the barons to a conference on an island in the Thames between Windsor and Staines,³ near the meadow of Runnymede. On June 15th the delegates met on that island in view of the opposing forces, and after going through the form of a negotiation, agreed upon the Great Charter of liberties in a single day.⁴

Meeting
at St.
Edmund's,
November,
1214.

Great
Charter
signed,
June 15,
1215.

An analysis of the Great Charter, when made in the light of the circumstances attending its execution, clearly reveals the fact that, although issued in the form of a royal grant, it was in substance a treaty or compact⁵ entered into between

Analysis of
the Great
Charter.

A treaty or
compact.

¹ *Ibid.*, p. 240; *Ann. Waverl.*, p. 178.

² M. Paris, p. 243; *Walter of Coventry*, ii. 215.

³ "Data per manum nostram in prato quod vocatur Runnymede, inter Windelesorum et Stanes." *Magna Carta*, § 63.

⁴ For the general history of the crisis, see M. Paris (ed. Wats), pp. 252-255; *Walter of Coventry*, ii. 219-229. See also Blackstone's Preface to *Magna Carta*.

⁵ M. Boutmy, in his comments on the "Constitution Anglais," has this to say: "Les pactes sont au nombre de trois: la grande Charte (1215) . . .

Consum-
mation of
union.

Effort to
fix limits of
innovation.

Church
guaranteed
free elec-
tions.

the royal authority on the one hand and the nation marshaled in the ranks of the three estates on the other. There is nothing in the provisions of the charter to recall obsolete distinctions of English and Norman blood; there is nothing to suggest differences of English and Norman law. The winning of the charter was in fact the final consummation of the work of union; it was the act of the united nation, the church, the barons, and the commons, for the first time thoroughly at one. There is no attempt to wipe out the irrevocable effects of the Conquest. The new system of central administration and the system of feudal tenures are both recognized as abiding elements in the constitution. The effort is to fix the limits of innovation, to define the extent to which the centralizing and feudalizing processes to which the Conquest gave birth shall be permitted to abridge the immemorial freedom in the time to come. In that vital question each estate is interested as a corporate entity, and the nation as a whole is also interested as a corporate entity. The provisions of the Great Charter, therefore, fall naturally into two broad divisions: first, those that specially relate to the rights and privileges of the three estates; second, those that relate to the rights and privileges of the nation as a whole. To the estate of the clergy the king promised that the Church of England should be free and that she should have her whole rights and liberties inviolable,¹ including the right to hold free elections lately guaranteed in a charter twice issued. To the estate of the baronage, consisting of the greater tenants-in-chief who held directly of the crown, the charter guaranteed many limitations and safeguards in

Le caractère de cet acte est aisé à définir. Ce n'est pas précisément un traité, puis qu'il n'y a pas ici deux souverainetés légitimes ni deux nations en présence; ce n'est pas non plus une loi; elle serait entachée d'irrégularité et de violence; c'est un compromis ou un pacte." *Études de droit constitutionnel*, pp. 39-41 (Paris, 1885).

¹ "Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illaesas." Art. 1.

mitigation of the feudal dues and services due by virtue of their tenures to the king as supreme landlord. And it was further provided that "all the aforesaid customs and liberties that we have granted to be held in our kingdom, so far as pertaining to us, with reference to our vassals, all men of our kingdom, as well clerk as lay, shall observe so far as pertains to them, with reference to their men."¹ In that way the feudal burdens are limited not only in favor of the baronage as against the king, but also in favor of all undertenants as against the mesne lords themselves. The feudal clauses that stand next in importance are those that impose restraints upon the exactions of lords in the matter of reliefs, wardships, and marriages.² In order to check the growing practice of subinfeudation, it was provided in the second reissue of 1217 that no tenant should give or sell to another so much of his land as would render the remainder insufficient to answer the services due to the lord of the fee.³ As stated heretofore, the term "commons," as it appears in England, must be understood to include all freemen, below baronial rank, organized and incorporated for government in shires and towns. First among the provisions designed for the protection of this estate is that clause which provides that the city of London shall have all its ancient liberties and free customs, as well by land as by water; and further that all other cities, boroughs, towns, and ports shall have all of their liberties and free customs.⁴ In that provision we have a definite recognition of the rights of the "commons" as organized in town communities. In the clause which provides that

Baronage
relieved of
feudal
burdens.

Subin-
feudation.

The
commons.

¹ Art. 60.

² As to the right of the heir, if of full age, to have his inheritance upon the payment of a fixed sum referred to as the "ancient relief," see Reeves, *History of English Law*, i. 382; ii. 20.

³ "Nullus liber homo de cetero det amplius alicui vel vendat de terra sua quam ut de residuo terrae suae possit sufficienter fieri domino feodi servitium ei debitum quod pertinet ad feodum illud." *Magna Carta* (1217), art. xxxix.

⁴ Art. 13.

all "counties, hundreds, wapentakes, and tithings shall stand at the old rent, without any increase, except in manors or royal demesne, we have a recognition of the rights of the 'commons,' as organized in shire communities."¹ "Neither town nor tenant shall be distrained to make bridges or banks, unless that anciently of right they are bound so to do."² In behalf of the merchant class it is provided that, except in time of war, they shall come in and go out of the kingdom without paying more than the ancient and allowed customs.³

Merchant
class.

Constitu-
tion of
national
council.

First among the clauses that embody the rights and immunities of the people as a whole, regardless of their division into classes, stand the great constitutional provisions relating to the organization and powers of the national council, to the procedure of the king's court, and to the general administration of justice. It was provided that no scutage or aid, other than the regular feudal aids, shall be imposed but by the common counsel of the nation;⁴ and this common counsel can only be taken in a national assembly summoned in the manner the law directs.⁵ The immemorial right of the national assembly to join with the king in ordaining taxes — a right never entirely ignored even among the Norman and Angevin reigns — was thus stated with a precision and clearness for which the nation itself seems to have been hardly prepared. In the many conformations in the charter that followed in the succeeding reign, these vital clauses as to taxation and the national council were invariably omitted. Not until the latter part of the reign of Edward I. was the right of self-taxation they embodied finally restored as a part of the "*Confirmatio Cartarum*" to a permanent place in the constitution. In order to lessen the hardships of

Taxation.

¹ Art. 25.

² Art. 23.

³ Art. 41.

⁴ "Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri," etc. Art. 12.

⁵ That direction is embodied in art. 14.

suitors¹ who were obliged to follow the king's court, it was provided "that common pleas shall not follow our court, but shall be holden in some certain place."² This provision led to the fixing of the common pleas at Westminster, which broke up the unity of the *curia*. But not until the end of the reign of Henry III. was the general staff permanently divided into three distinct courts,—exchequer, common pleas, and king's bench,—each exclusively devoted to the hearing of a different class of cases.³

Common
pleas fixed
at West-
minster.

The decision of all extraordinary or difficult causes of a judicial nature was reserved to the king in council,⁴ the bulk of the business coming before it in the form of petitions divided into bundles, and then severally assigned to different members, according to their special knowledge of them.⁵ High among the members of the council stood the chancellor, whose connection with judicial business begins with the issuance of the writs proceeding from the king as the fountain of justice.⁶ As a baron of the exchequer,⁷ and as a leading member of the *curia*, the chancellor had long been in possession of judicial functions, and so to him, as to other justices, were referred a definite class of petitions. In that way the chancellor was called upon to decide a distinct class of suits as a judge according to the rules of the common law, and hence the origin of what is called his "common-law

Judicial
supremacy
of king in
council.

The
chancellor.

¹ As to the history of the plea of Richard d'Anesty, which "followed the person of the king" for five years, and which imposed upon D'Anesty nearly thirty different journeys, see Palgrave, *English Commonwealth*, ii. ix.-xxvii.; Stephen, *History of the Criminal Law*, i. 88 sq.

² Art. 17. As to the history of that clause in its relation to the *curia regis*, see Madox, *History of the Exchequer*, vol. i., ch. xix., pp. 787-801; Reeves, ii. 30-33, and notes.

³ *Benedictus*, vol. ii., Preface, 76, Rolls Series.

⁴ As to the general character of the causes reserved for the king, see *Dialogus de Scaccario*, i., c. 8.

⁵ Ryley, *Pleadings*, etc., pp. 442, 459. See Hardy, Preface to the Close Rolls, i. xxviii.

⁶ Campbell, *Lives of the Chancellors*, i. 3.

⁷ Madox, *History of the Exchequer*, p. 131.

His com-
mon-law
jurisdiction.

jurisdiction.”¹ The “equitable jurisdiction” of the chancellor must be traced to a higher source. One of the leading objects of dividing the petitions that came before the council into distinct classes was to sever from the general mass those special “matters of grace and favor” which could only be answered after reference to the king in person.² The examination of this peculiar class of petitions, constituting a special branch of business, devolved in such a great degree upon the chancellor that finally they began to be addressed to him in the first instance, instead of being referred to him by the king. When, early in the reign of Edward III., the chancellor ceased to follow the court as one of the royal retinue, his tribunal began to acquire a more distinct and substantive character; and from the twenty-second year of that reign, in which all petitions of grace and favor were recognized as his province, his separate and independent jurisdiction began to grow in power and importance.³ By equitable jurisdiction must be understood “the extraordinary interference of the chancellor, without common-law process or regard to common-law rules of proceeding, upon the petition of the party aggrieved, who was without adequate remedy in a court of common law.”⁴ Thus the “equitable jurisdiction of the chancellor” became one of the three great agencies that have adapted the old, inelastic code of English customary law to the expanding wants of a progressive society, repeating the function performed at Rome by the praetorian equity in the expansion of the Twelve Tables.

His
equitable
jurisdiction.

Judicial
clauses of
Great
Charter.

First in importance among the judicial clauses of the Great Charter stands that one which provides that “no freeman shall be taken or imprisoned, or disseized, or outlawed, or exiled, or anywise destroyed; nor will we go upon, nor send upon him, but by the lawful judgment of his peers

¹ Gilbert, *History of the Exchequer*, p. 8.   ² Ryley, *Pleadings*, etc., p. 442.

³ Rot. Claus., 38 Edw. III.; Hardy, *Close Rolls*, i., Preface, xxviii.

⁴ Campbell, *Lives*, i. 7.

or by the law of the land. To none will we sell, to none will we deny or delay, right or justice.”¹ In the reissues the first provision appears with the insertion in the second (2 Hen. III., 1217 A.D.) and third (9 Hen. III., 1225 A.D.) charters of Henry III. of the words, “of his freehold or liberties, or free customs,” so that the clause in its final form is: “No freeman shall be taken or imprisoned or disseized of *his freehold, or liberties, or free customs* [de libero tenemento suo vel libertatibus, vel liberis consuetudinibus suis], or outlawed, or exiled,” etc. The old fancy that the “*judicium parium*” of this clause was intended to guarantee trial by jury has been dispelled by the discovery that jury trials did not come into existence until nearly a century after that time.² The guarantee of “the lawful judgment of peers” referred only to a certain feudal right with which trial by jury has no connection.³ The guarantee that no man should be deprived of his rights but “by the law of the land” was intended however as an assurance that no judgment should be rendered in any arbitrary proceedings upon the part of the king which deprived the defendant of any of the known methods of trial to which he was then entitled.⁴ As time went on the 39th

Jury trials
not guaranteed.

¹ “Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae.” Art. 39. “Nulli vendemus, nulli negabimus, aut differemus, rectum aut iusticiam.” Art. 40.

² See above, pp. 278 sq. “For a legal instrument to call the verdict of recognitors a judgment would have been as gross a blunder in 1215 as it would be at the present time.” Pollock and Maitland, *History of English Law*, i. 173, n., 2d ed. For the old view, now universally repudiated, see Bagg’s Case, as reported in 1 Rolle’s Rep. 225; 4 Blackst. Comm. 349; *Thompson v. Utah*, 170 U.S. 349; *Maxwell v. Dow*, 176 U.S. 609. The matter is, however, correctly stated in *Hurtado v. California*, 110 U.S. 529. See McGehee’s excellent treatise on “*Due Process of Law*,” pp. 5 sq.

³ The whole matter is well put in McKechnie, *Magna Carta*, pp. 158 sq., 438 sq.

⁴ “The expression ‘*per legem terrae*’ simply required judicial proceedings, according to the nature of the case; the duel, ordeal, or compurgation, in criminal cases, the duel, witnesses, charters, or recognition, in property cases.” Bigelow, *History of Procedure*, 155, n. See also Thayer, *Evidence*, 200–201, for a discussion of the phrase “*lex terrae*.”

Due process of law guaranteed. chapter was so construed as to become a guarantee of "due process of law." It was finally enacted (Stat. 28 Edw. III., c. 3), "That no man, of what state or condition soever he be, shall be put out of his lands, or tenements, nor taken, nor imprisoned, nor indicted, nor put to death, without he be brought in to answer by due process of law."¹ Among the special provisions touching particular branches of judicial administration may be cited those that provide that the freeman shall only be amerced according to his fault, saving to him the means of maintenance; and in like manner the merchant, saving to him his merchandise; and also the villein, except he be the king's villein, saving to him his wainage. No amercement shall be assessed in any case but by the oaths of honest and lawful men of the neighborhood.² Earls and barons shall be amerced according to the offense, but only by the judgment of their peers.³ As a protection to the local jurisdictions it was provided that the use of the writ of praecipe should be limited.⁴ No bailiff shall henceforth force a man to compurgation or ordeal unless the accusation is supported by credible witnesses,⁵ — the petty jury in criminal cases not then being in existence.

Amercements.

Writ of praecipe.

Criminal accusations.

Charter embodied programme of reform.

The fact must never for a moment be lost sight of that the great act of the "Parliament of Runnymede" marks the beginning, not the end, of a conflict. It embodies not a final statement of concessions to the nation from the crown, but rather a definite programme of reform which the nation resolves to persevere in until it is finally accepted by the crown as an irrevocable basis of government. During a

¹ For Coke's interpretation of "due process of law," as understood in the seventeenth century, see *Institutes*, 46, 50.

² Art. 20.

³ Art. 21. Upon the subject of amercements, see Reeves, *History of English Law*, ii. 35-39.

⁴ Art. 34. For the history of that writ, see Bigelow, *History of Procedure*, pp. 77, 78, 83.

⁵ Art. 38.

period of more than eighty years the crown resists the right of the nation to enter into the full enjoyment of the rights and liberties the charter defines. The struggle ends at last with the confirmation of the charters at the close of the reign of Edward I. The first stage begins with the death of John in October, 1216, when the crown passed to his son Henry III., then in his tenth year. For the first time since the days of the second Aethelred, the crown had fallen to a child;¹ for the first time since the Conquest had it become necessary for the representatives of the nation to appoint a guardian for the king. The baronage chose William Marshall as "*rector regis et regni*."² It is probable that to the minority of Henry can be traced the beginnings of the constitutional doctrine that the king can do no wrong, and that the ministers who advise him are responsible to the assembled representatives of the nation who have a consultative voice in their appointment. In the duly recorded proceedings of the Parliament of 1242, which survives as the earliest authorized report of a parliamentary debate,³ we find the assembly, after thoroughly discussing the expediency of a foreign war, bold enough to oppose it by refusing an aid to the king to carry it on. In November, 1213, just after the gathering of the baronage at St. Alban's and St. Paul's, John called a council at Oxford, to which the sheriffs were directed to summon, besides the armed force of knights, four discreet men from each shire,⁴ to share in the king's deep speech touching the affairs of his kingdom, to form, in short, the first representative Parliament. This is the first writ in

First
regency
since
Conquest.

King can
do no
wrong.

Represent-
atives from
shires and
towns.

¹ Aethelred was elected at the age of ten years.

² *Foedera*, i. 215; M. Paris, p. 289. Cf. Gneist, *The English Parliament*, p. 87.

³ M. Paris, pp. 581, 582; *Select Charters*, p. 368, 2d ed.

⁴ "Quatuor discretos homines de comitatu tuo illuc venire facias ad nos ad eundem terminum ad loquendum nobiscum de negotiis regni nostri." The summons to the Oxford council may be found in the *Lords' Report* (App. 1, p. 2); but as the historians forsake us, we do not even know that the assembly was ever held.

which the "four discreet men" of the county appear as representatives; it is the first instance of the summoning of the folk moot to a general assembly by the representative machinery used already for judicial purposes. To Henry's Parliament of 1254 the chosen knights from the shires are summoned for the first time since the reign of John.¹ In order to conclude the arrangements embraced in the "Mise of Lewes," and in order to gain a broad popular basis for his government, Simon of Montfort, in 1265, issued the writ for his famous Parliament, to which were summoned not only two discreet knights from each shire, but also, for the first time in English history, two representatives from the cities and boroughs.² A period of thirty years then elapsed before the experiment was repeated; the representatives of the cities and towns were not again summoned until Edward's great Parliament of 1295,³ in which the estate system in England reached for the first time its full and final development. That Parliament — in which the baronage appear in person and the clergy and the commons, each as an estate of the realm, in the persons of their chosen representatives — completes the transition in the constitution of the national assembly from a feudal council to a council of estates. The time had now come when the supreme question, involving the right of the nation to tax itself, — a right which the barons of Runnymede had clearly defined, but which the struggles of eighty years had failed to confirm, — had to be settled once

Model
Parliament
of 1295.

¹ "It seems to have been the first instance appearing on any record now extant of an attempt to substitute representatives elected by bodies of men for the attendance of the individuals so to be represented, personally or by their several procurators in an assembly convened for the purpose of obtaining an aid." *Lords' Report*, App. 1, p. 13, and also i. 94, 95.

² "Item in forma praedicta scribitur civibus Eboraci, civibus Lincolniae, et ceteris burgis Angliae, quod mittant in forma praedicta duos de discretioribus, legalioribus et probioribus tam civibus quam burgensibus." *Lords' Report*, App. 1, p. 33.

³ "The national councils of 1273 and 1283, and the Parliament of Acton Burnell, contained representatives of the towns, but they are not allowed by the constitutional lawyers the full name of parliaments." *Select Charters*, p. 44.

and for all between the nation and the king. When in 1297 Edward I. precipitated the conflict by attempting to tax the nation without its authority, it met him in arms under the leadership of the earls Bigod and Bohun, who demanded the confirmation of the charters, supplemented by certain additional articles, all of which were confirmed by the king at Ghent on November 5.¹ The new articles, thus solemnly made a part of the constitution, not only denounced all of the unauthorized taxation, but they also provided that, with certain exceptions, no taxes should henceforth be imposed without the common consent of the realm and to the common profit thereof. The king was made to promise the clergy, the barons, and "all the commonalty of the land, that for no business from henceforth will we take such manner of aids, tasks, nor prizes, but by the common assent of the realm, and for the common profit thereof, saving the ancient aids and prizes due and accustomed."² And in order to extend the limitation to indirect as well as direct taxation, the articles further provide that the royal right of taxing wool shall not in the future be exercised "without their common assent and good will; saving to us and our heirs the customs of wools, skins, and leather granted before by the commonalty aforesaid."³ Thus by the reincorporation into the charters of these vital limitations upon the royal right of taxation which for more than eighty years had been omitted from them, the prolonged struggle inaugurated by the barons of Runnymede ended at last in a completely

Confirmatio Cartarum, November 5, 1297.

Parliament's exclusive right to authorize taxation recognized.

¹ *Foedera*, i. 880. The charters had been previously confirmed by *inspeximus* on the 12th of October. *Ibid.* i. 879; *Statutes of the Realm*, i. 114-119.

² Art. vi.

³ Art. vii. The supplementary articles are preserved in French and Latin, and the two forms differ materially from each other. In the French form the articles have become a permanent part of English law. *Statutes of the Realm*, i. 124-125. In their Latin form, preserved by Walter of Hemingburg (ii. 152), the articles are generally known as the statute *De tallagio non concedendo*. As such the Latin articles were referred to as a statute in the preamble to the Petition of Right, and were decided by the judges in 1637 to be a statute.

successful consummation. The exclusive right of the national assembly to authorize taxation was now fully and finally recognized, save so far as that right was limited by the proviso, "saving the ancient aids and prizes due and accustomed." ¹

The growth
and de-
cline of
Parliament.

11. The early history of the representative system in England is divided into two epochs: first, that in which the reeve and four men appear as representatives of the township in the courts of the hundred and the shire; second, that in which the representatives of the shires and towns appear in national parliaments. Not until John's writ of 1213, directing the sheriffs to summon to a council at Oxford four discreet men from each shire, was an attempt made in England to lift the representative system, which had existed immemorially in the local courts, into a higher sphere. The representative character of the elected knights, as well as the qualification of the electors, were both determined by the nature of the only court or assembly in which the sheriff could constitutionally execute the writ under whose mandate the knights were chosen. The sheriff could only act in the county court, which was composed of the whole body of freeholders, and he could only act in accordance with those methods of procedure with which the shire community had been immemorially familiar. The Old-English town or borough was simply a subdivision of the shire "in which men lived closer together than elsewhere; it was simply several townships packed tightly together, a hundred smaller in extent and thicker in population than other hundreds." ² While the early history of the borough constitution is obscure, in it was undoubtedly embodied the system originally represented by the free township, which survived as the basis of

Elected
knights.

The
borough
consti-
tution.

¹ By that provision the king refused "to relinquish his old-exchequers-rights over the settlers on his domain lands, and over the tolls traditionally fixed (*custuma antiqua*), those, namely, on wool, hides, and leather." Gneist, *English Parliament*, note to p. 136. (Shee's trans.)

² Freeman, *Norman Conquest*, v. 312.

municipal authority. The burghemot, hustings, or law court of the Old-English town was usually nothing more than the hundred court in a slightly different form; its origin was the same, and its procedure substantially the same.¹ Under the writ commanding the sheriff to return members from the towns he could extend or withhold the privilege as he saw fit.² While the real election of borough members took place in the boroughs themselves, the formal election of all representatives took place in the county court.³ At the time fixed in the writs, the lords spiritual and temporal, together with the representatives from the shires and towns, were expected to appear before the king at Westminster, or at any other place he had seen fit to designate. Not until the reign of Edward I. did Westminster become in the full sense of the term the seat of government.⁴ Then it was that the dwelling place of the king was gradually devoted to the uses of government: the chamber became a council room; the banquet hall a court of justice; the chapel a hall of deliberation. While it is probable that the three estates deliberated apart from the beginning, save when momentarily assembled for special purposes, not until the reign of Edward III. was Parliament definitely divided into two houses.⁵ In

Borough
representa-
tives.

West-
minster
the seat of
govern-
ment.

Parliament
divided into
two houses.

¹ *Essays in Anglo-Saxon Law*, p. 22. As to the relation of guild organization to borough organization, see Taylor, *The Origin and Growth of the English Constitution*, i. 458-460.

² See Brady on Boroughs, pp. 110-126; Prynn, 3d Register, p. 231; *Lords' Report*, i. 375. To remedy that abuse a statute was passed (5 Rich. II., stat. ii., c. 4) which imposed a fine upon the sheriff for such neglect. *Lords' Report*, i. 341.

³ For details, see Taylor, *The Origin and Growth of the English Constitution*, i. 471-474.

⁴ In the reign of Henry III., who rebuilt the Abbey and enlarged the palace, Westminster finally came to be considered as the customary and lawful meeting place of Parliament.

⁵ Not until 1332 do the parliamentary records distinctly mention the fact that the prelates, the lords temporal, and the knights of the shire deliberated apart, — the prelates by themselves, the earls and other gentry by themselves, and the knights from the counties by themselves. *Rot. Parl.* ii. 66. In the next year we learn that the lords and the proctors sat apart by themselves, and the knights, citizens, and burgesses by themselves. *Rot. Parl.* ii. 69.

1352 the commons were ordered to the Chapter House of Westminster Abbey; ¹ in 1377 Sir T. Hungerford was chosen speaker, the first to whom the title and position were definitely assigned; ² while the chancellor, not necessarily a peer, usually presided in the House of Lords. From the beginning the clergy opposed Edward's idea of summoning the representatives of both provinces as a constituent element in a national council as developed in the *praemunientes* clause contained in the writs by which he called together his famous Parliament of 1295. The *praemunientes* clause itself is still inserted in the writs, but it has been a dead letter since the fourteenth century. ³ The clergy of the two provinces, refusing to be jointly assembled as an estate of Parliament, continued to tax themselves in their provincial convocations until after the restoration of Charles II., when, in 1664, by a mere verbal agreement between Archbishop Sheldon and Lord Chancellor Clarendon, an arrangement was made under which the clergy waived their right to tax themselves, and agreed to be assessed by the laity in Parliament, ⁴ gaining thereby the new right of voting at the election of the members of the House of Commons by virtue of their ecclesiastical benefices. ⁵ The refusal of the representatives of the clergy habitually to assemble as a separate estate of Parliament fixed the fact that the national legislature of England should consist of two houses instead of three.

It is all-important to ascertain how it was that the younger

¹ May, *Parliamentary Practice*, p. 25, citing Elsynge, p. 104. Not until the reign of Edward VI. did St. Stephen's Chapel become the meeting place of the commons.

² *Rot. Parl.* ii. 374. See May, *Parliamentary Practice*, p. 23 and note.

³ *Select Charters*, p. 38.

⁴ Speaker Onslow, in a note appended to Burnet, *History of his Own Times* (Oxford ed., iv. 308), says, "Gibson, Bishop of London, said to me that it was the greatest alteration in the constitution ever made without an express law." Its results were distinctly recognized by an act of Parliament passed in the following year (16 and 17 Car. II., c. 1).

⁵ A right more than once recognized by statute. *E.g.* 10 Anne, c. 23, and 18 Geo. II., c. 18.

Clergy
refused to
be jointly
assembled.

Sheldonian
compact
of 1664.

body — composed of representatives from the shires and towns — gradually won through persistent effort, first the right to participate in taxation, then to participate in legislation, then to impeach the ministers, and finally to participate in the control of the royal administration and in the deposition of the king himself. The idea that the nation was in some form consulted even during the Norman period is strengthened by two records which belong to the reign of Henry I.: in one the king describes “the aid which my barons gave me”;¹ in the other — the charter ordering the restoration of the local courts — he speaks of summoning the county courts whenever his royal necessity should require it.² These two documents clearly indicate the only two methods through which the nation, prior to the appearance in the national council of the representative members, could be consulted in reference to taxation. The grants made by the lay and spiritual baronage did not bind absolutely the inferior clergy, nor the main body of the nation incorporated for government in shires and towns.³ Before contributions could be drawn from the clergy and the commons, separate negotiations had first to be conducted with the archdeacons of each diocese representing the spiritual estate, and with the several county courts in which representatives appeared from every portion of the shire community. Such negotiations between the crown and the local communities were carried on by a detachment of justices from the exchequer during their fiscal circuits of the shires. There can be no doubt that the elected knights were at first summoned to Parliament for the purpose of consenting to taxation upon the part of the shire

Early participation of the commons in taxation.

Taxation in the Norman period.

Representatives summoned as fiscal expedient.

¹ “Auxilium quod barones mihi dederunt.” *Chron. Abregd.* ii. 113.

² “Ego enim, quando voluero, faciam ea satis summonere propter mea dominica necessaria ad voluntatem meam.” *Foedera*, i. 12.

³ In the grant made by certain bishops and barons of an aid “pur fille marier” in the Parliament of 1290 the limitation is put, in so far as in them lay. The facts are thus stated in the writ: “Pro se et communitate totius regni quantum in ipsis est.” *Rot. Parl.* i. 25.

communities, as a matter of fiscal expediency merely. Instead of the officers of the exchequer going down into the shires to there negotiate separately as to the amount each would give, it was deemed more expedient for each shire to send representatives to the national council armed with full power to express its corporate assent to whatever tax the general voice might there impose. The same motive, at a later day, brought about the appearance of elected representatives from cities and towns. Thus was completed the transition from the older system of separate consent to taxation, growing out of feudal ideas, to the more efficient and comprehensive one of general consent expressed as the corporate act of the nation in an assembly of estates.¹ How the exclusive right of Parliament to authorize taxation was finally established through "*Confirmatio Cartarum*," in 1297, has been explained already. The right of the commons to participate in taxation drew after it the right to participate in legislation. As early as the reign of Henry III. the principle was openly recognized by both the crown and the nation that concessions in favor of liberty moving from the former to the latter were legitimate subjects of bargain and sale.² Representatives of the commons, when regularly summoned to Parliament as a matter of fiscal expediency, were quick to learn how to insist upon the redress of grievances in return for a money grant. When such a grant was asked, it became the custom for the commons to put forward in the form of a petition to the crown such grievances as required amendment at the hands of the king and his council.³ To

Transition
from sepa-
rate to
general
consent.

Participa-
tion in
legislation.

Supply de-
pendent on
redress of
grievances.

¹ The process of transition belongs to the years 1282-1295.

² In the confirmation of the charters in 1225 the king openly admits that "pro hac autem concessione et donatione libertatum istarum et aliarum libertatum contentarum in carta nostra de libertatibus forestae, . . . omnes de regno nostro, dederunt nobis quintam decimam partem omnium mobilium suorum." *Statutes, Charters of Liberties*, pp. 22-25.

³ As early as 1309 the commons granted a subsidy "*upon this condition*, that the king should take advice and grant redress upon certain articles wherein they are aggrieved." For the articles, eleven in number, see Prynne, 2d Register,

such petitions the king was expected to make his answer during the session of Parliament, and out of the petition and answer the statute was coined by the king's advisers and proclaimed as law.¹ Not until after the eighteenth year² of Edward I. was the right of the commons to assent to legislation clearly established. Thereafter the ancient formula is widened, and the king legislates "by the assent of the prelates, earls, barons, and commonalty of the realm."³ In order to remedy certain grave evils and uncertainties that grew out of "this extracting of the statute out of the petition and answer, about the latter end of Henry VI. and beginning of Edward IV., they took a course to reduce them, even in the first instance, into the full and complete form of acts of Parliament."⁴ When that departure was made from the older form of initiation by petition, when bills were introduced in the form of statutes,—the original drafts of which could only be altered by the Parliament itself,—the transition from royal to national legislation, which began with the reorganization of the feudal council as a representative assembly, reached its full and final consummation. And here reference should be made to the distinction between the ordaining power of the king in council and the enacting power of the king in Parliament.⁵ At what exact point of time the Parliament, after drawing to itself the exclusive right to authorize taxation and to initiate legislation, secured the more

Abuses growing out of procedure by petition.

Difference between a statute and an ordinance.

p. 68. In 1301 the lords had told the king that if the demands made by them in behalf of the whole community were granted, they would increase their gift from a twentieth to a fifteenth. *Parl. Writs*, i. 105.

¹ Hale, *History of the Common Law*, i. 16, 17.

² In that year the statute *Quia emptores* was enacted by the king and barons, before the day for which the commons were summoned. See *Lords' Report*, App. 1, 54.

³ During the reign of Edward III. the name of the commons is rarely omitted from the enacting clause of a statute. See Clifford, *History of Private Bill Legislation*, i. 288.

⁴ Hale, *History of the Common Law*, i. 18. See also Ruffhead's *Statutes*, Preface.

⁵ See Taylor, *The Origin and Growth of the English Constitution*, i. 496-497.

comprehensive right to deliberate in all matters of national concern, it is difficult to determine. The right established by the baronage, upon the accession of Henry III., to control the royal administration during the minority of the king, was expanded before the end of that reign into a general right of control whenever the exigencies of the state might require it.

Full right
of delibera-
tion.

But the full right of deliberation in Parliament did not pass to the representatives of the shires and towns until the reign of Edward III., whose financial necessities, occasioned by his expensive foreign wars, rendered him continually dependent upon their bounty. At the very beginning of Edward's reign, the treaty of peace with Scotland was settled with the counsel and consent of the prelates, earls, barons, and commons;¹ and, as soon as his personal rule begins we find him, in 1331, consulting Parliament on the questions of war or peace with France.² As incidents to the substantive right to supervise and control the royal administration, thus fully established by Parliament during the reign of Edward III., should be noted the right to audit the public accounts, and to appropriate the supplies to special purposes.³ Before the close of that reign the doctrine of ministerial responsibility, so clearly announced in the memorable proceedings of 1341,⁴ assumed a more serious and threatening aspect when the commons began to employ for the first time the new constitutional weapon of impeachment. Not until the fiftieth year of Edward III. do we find, in a series of proceedings that occur in the Good Parliament, a clear instance of a parliamentary impeachment in the sense in which that term is now understood. The proceedings against the lords Latimer and Neville, and their agents and accomplices,⁵ are regarded

Right to
audit ac-
counts and
appropriate
supplies.

Impeach-
ment.

¹ *Rot. Parl.* ii. 442; *Foedera*, ii. 730.

² *Ibid.* ii. 61.

³ The right of appropriation was not clearly established until the middle of the fourteenth century. It was firmly reestablished in 1666 by the Appropriation Act of Charles II. See Hallam, *Constitutional History*, ii. 356.

⁴ *Rot. Parl.* ii. 128, 130.

⁵ *Rot. Parl.* ii. 323-326 and 329.

by the historians as the earliest instance of a trial by the lords upon a definite accusation made by the commons sitting as a grand jury of the whole realm. Through the establishment of that means of punishment the doctrine of ministerial responsibility was finally placed upon a definite constitutional basis. As the constitution prescribed no mode, short of deposition, through which the king could be made personally amenable for any act of maladministration, it became necessary to accept the legal fiction that the king in his political capacity could do no wrong, or rather that in the conduct of public affairs nothing could be imputed to his bad intentions. Not until the feudal councils of the Norman and Angevin kings were transformed into an assembly of estates did the representatives of the nation dare to revive that highest of all rights which the witan had occasionally exercised from the earliest times. By the deposition of Edward II. the Parliament, for the first time since the Conquest, asserted the right to rid the nation of a worthless and incompetent king, — an event followed, after an interval of seventy-two years, by the deposition of Richard II.¹ By the end of the fourteenth century the Parliament as an assembly of estates had won for itself the possession of five substantive rights embracing all the higher functions of government: 1. The exclusive right to authorize both direct and indirect taxation; and as an incident thereto the commons claimed the right to make the grant of supplies dependent upon the redress of grievances. 2. The right to concur in the enactment, amendment, and repeal of all permanent acts of national legislation. 3. The right to supervise and control the royal administration; and as incidents thereto (*a*) the right to appropriate the supplies to special purposes, (*b*) and to audit the accounts explaining the methods of their expenditure. 4. The right to impeach and punish the ministers. 5. And finally the right to depose

King can do
no wrong.

Right of
deposition.

Five sub-
stantive
rights.

¹ For details, see Taylor, *The Origin and Growth of the English Constitution*, i. 504-507.

the king himself and to vest the succession in another member of the royal house more competent to govern. And yet, when a summing up is made of the results of the two processes of subtraction through which the bulk of the judicial business was transferred from the king and council to the great courts of law and equity on the one hand, and the virtual control of the legislative, taxative, and fiscal business of the kingdom to the Parliament on the other, the important fact remains that neither process was exhaustive. After the jurisdictions of the four great courts at Westminster had been finally established, an undefined reserve of judicial power still remained to the king in council, out of which at a later day grew the court of star chamber and the judicial committee of the privy council. In the same way, and to about the same extent, the Parliament, in its effort to draw to itself the exclusive control of taxation and legislation, stopped short of complete victory. At the end of the struggle there still remained in the hands of the king in council an undefined reserve of legislative power for a long time exercised in the making and revoking of a class of temporary enactments known as ordinances. By the end of the fourteenth century all of the substantive powers of Parliament had reached their full growth. During the fifteenth no new powers are added. Nothing, in fact, transpires in the history of Parliament during the latter period more important than the settlement of its principal forms of procedure, and the assertion and definition of privileges belonging either to Parliament as a whole, or to the respective houses of which it is composed, or to its individual members.

An undefined residuum of judicial and legislative power remains to the king in council.

Definition of parliamentary privileges.

House of Lancaster.

Through the exercise of the ultimate power of deposition and election Parliament raised the House of Lancaster to the throne, and for more than sixty years it reigned by virtue of a parliamentary title, four times regulated during the reign of Henry IV.¹ To the ascendancy thus gained by Parliament

¹ *Rot. Parl.* iii. 434, 525, 575, 576, 581.

over the monarchy, in the hands of that branch of the royal house which may be regarded as its own creation, must be added the advantage that accrued to the estates by reason of the continual dependence upon them of the ruling house for the means with which to maintain a never-ending foreign war. As early as 1407 a collision occurs which "seems to have placed the king and the two houses of Parliament each in the separate and independent situation in which they now respectively stand."¹ The outcome was the definition of the two vital principles of constitutional law that declare, first, that all money bills shall originate in the House of Commons; second, that the king shall not take notice of matters debated in Parliament until after a conclusion has been reached in each house, and such conclusion brought before him by their consent and authority.² After the accession of Henry IV. the estates were not slow to reassert the principle that the exercise of the royal authority should be limited and controlled by the action of the council, and that the council itself should be controlled by the Parliament. It is not the baronage, however, as in the days of Henry III., Edward II., and Richard II., who take the initiative, but the commons, who now appear as the more aggressive element, demanding that the executive government shall be conducted in accordance with the views of the national assembly. In the Parliament of 1404 the commons ventured not only to attack the organization of the royal household, but also to request the king to appoint in Parliament the servants who were to compose his great and continual council, a request promptly complied with.³ Two years later the commons informed the king that their motive in making the grant then asked was not only their fear of God and their love for him, but "the great confidence which they had in the lords elected and ordained to be of the continual

Two vital principles defined in 1407.

Council to be controlled by Parliament

¹ *Lords' Report*, i. 359.

² *Rot. Parl.* iii. 611; *Lords' Report*, i. 358, 359; Hallam, *M.A.* iii. 100-102.

³ *Rot. Parl.* iii. 525, 526, 530.

Regularly
paid and
sworn
councilors.

council." ¹ As early as the reign of Richard II. there existed a body of regularly paid and sworn councilors; during the reign of Henry IV. the commons pray that the lords of the council be suitably rewarded; ² and during the minority of Henry VI. their pay was regulated by a scale guaranteeing to each member a fixed sum according to his rank and dignity. ³ The sworn and paid councilors who thus devoted themselves regularly to the king's business began to be known during the reign of Henry VI. as the "privy council," — the private or inner circle of the greater body generally known as the "ordinary council," or simply as "the council." ⁴

House
of York.

The hope, apparently well grounded, that in the assembly of estates the English nation had at last found a defender, constant enough and strong enough to maintain its liberties as against the monarchy in all the years of struggle and of change that were yet to come, ended the moment the immature parliament system was called upon to maintain itself amid the vicissitudes of a dynastic struggle between two factions it was powerless to control. By the fall of the House of Lancaster the first period of parliamentary growth was brought suddenly to a close. With the accession of the House of York began a prolonged period of reaction that reached its highest point under the House of Tudor, when the monarchy, released from the fetters and safeguards the growth of the parliamentary system had put about it, resumed in substance, if not in form, the exercise of that system of royal autocracy it had wielded before the charters were won. So long as the elements composing the estate system remained intact, so long as those elements acted in concert against the monarchy

Collapse of
immature
parlia-
mentary
system.

¹ *Lords' Report*, i. 368.

² *Rot. Parl.* iii. 577.

³ *Proceedings of the Privy Council*, iii., Preface, xix. and p. 154; *Rot. Parl.* iv. 374.

⁴ *Dicey, The Privy Council*, pp. 44, 45. The same author says (p. 43), "Reasonable doubts may be entertained whether, prior to Henry VI., the 'Privy' and 'Ordinary' council were in any sense distinct bodies." As to the rules and regulations imposed upon the council of regency during that reign, see *Stephens, Comm.* ii (8th ed.), 460.

in the national Parliament, so long the monarchy lay helpless in the hands of a coalition which could grant or withhold supplies, which could dictate its policy and punish its ministers, and which, as a last resort, could lay its hands upon the throne and depose the king himself. The causes, which upon the accession of Edward IV. led to the reëstablishment of the monarchy, and to the suspension of the system of parliamentary life that had overawed it for more than a century, must be found in the processes of dissolution and decay which by that time had undermined not only the corporate vitality of each of the three estates, but which had also dissolved that spirit of union and interdependence, born of a common oppression, that in the earlier days had bound them to each other. As the parliamentary system was the outcome of the estate system, the collapse of the one naturally followed the collapse of the other.¹ In reëstablishing the monarchy, Edward was careful to emphasize the fact that, as the right of the House of Lancaster had rested solely on parliamentary election, that of the House of York rested solely upon an indefeasible hereditary title, which he claimed the Lancastrian parliaments had no right to ignore, no power to set aside. Upon that assumption, then for the first time practically asserted in English politics, Edward held that the Lancastrian kings were only *de facto non de jure*,² — that their judicial acts were valid and binding only so far as he and his parliaments saw fit to ratify them.³ The financial relief the ending of the Hundred Years' War then brought to the monarchy was made permanent by a policy of peace which, throughout the reigns of Edward IV. and Henry VII., remained unbroken. While the treasury

Indefeasible hereditary right.

A policy of peace.

¹ For a more complete statement, see Taylor, *The Origin and Growth of the English Constitution*, i. 562-576.

² The theory was that Edward IV. succeeded to the rights of Richard II., and that the three Lancastrian kings were usurpers: "Henry usurpour, late called Kyng Henry the sixt," is the language of the act of 1461. See Reeves, *History of English Law*, iv. 12, n., Finlason ed.

³ *Rot. Parl.* v. 480 sq. The validity of laws passed during the Lancastrian reigns was not questioned.

Judicial
powers of
council
expanded.

was thus protected from the drain of war on the one hand, its coffers were filled on the other by various expedients which, although they involved the agency of Parliament in the first instance,¹ did not involve its annual assent or coöperation. While Edward was thus emancipating the monarchy from the financial and political restraints the growth of the parliamentary system had put about it, he was also careful to impart a fresh force to the judicial powers of the council which the growth of the law courts and the rise of the equitable jurisdiction of the chancellor had contracted without exhausting. The uniformly weak and inefficient system of internal administration that prevailed throughout the Lancastrian reigns which, even in times of peace, could neither preserve order nor guarantee a firm administration of law, almost completely gave way during the protracted confusion of the civil war. The remedy finally proposed for evils of that character took the form of statutes authorizing the council to draw before it all persons and all causes that could not be dealt with in the ordinary local tribunals. With that end in view was passed the Act of 31 Henry VI., c. 2, enlarging the powers of the council, whose judicial authority had, to judge by the minutes of Henry's reign, been exerted chiefly in cases where, from the might of the offenders, the courts were powerless to enforce justice.² The effort thus made in the reign of Henry VI. to strengthen the hands of the council, in order to make it the defender of order against anarchy, was followed in the reign of Edward IV., by an attempt to convert the judicial powers of the king in council into an irresponsible engine of tyranny.³

Edward
converts it
into an
engine of
tyranny.

¹ In the flush of victory Edward obtained a sweeping bill of attainder (*Rot. Parl.* v. 467-475), and four years later a grant of tunnage and poundage and a subsidy on wool for life (*Ibid.* v. 508).

² Dicey, *The Privy Council*, p. 72.

³ By the patents issued, first to Tiptoft and then to Rivers, the jurisdiction of the high constable was extended, in contempt of the common law, to cases of high treason. As to the terms of the patent to Rivers, August 24, 1467, see *Foedera*, xii. 581, 654. The enumerated powers had been originally conferred on Tiptoft in 1462.

So far as constitutional history is concerned, the short reign of Richard III. is a mere episode. The real successor of Edward IV., in a constitutional sense, is Henry VII. The despotic policy founded by Edward was continued by Henry and his successors, by whom it was systematized and enforced as a permanent system of government. The vital organ of such policy was necessarily the council, — the stronghold of the monarchical system.

Real successor of Edward IV. Henry VII.

12. From the accession of Henry VII. to the Revolution of 1640 the history of the council is the history of the monarchy. During that period of a century and a half, both the law courts and the Parliament crouched at the feet of its paramount authority. The fact has been heretofore emphasized that the undefined judicial powers of the king in council were not exhausted by the growth out of that body of the great courts of law and equity. The judicial supremacy of the king is neither limited nor fettered by the new rule; the original nucleus of light remains unimpaired. After the organization of the four great courts at Westminster, the council still retained a residuary jurisdiction, both civil and criminal, original and appellate. "It seems," says Sir Francis Palgrave, "that in the reign of Henry III. the council was considered as a court of peers within the terms of Magna Carta; and before which, as a court of original jurisdiction, the rights of tenants holding *in capite*, or by barony, were to be discussed or decided; and it unquestionably exercised a direct jurisdiction over all other of the king's subjects."¹ The tendency of that unlimited and undefined jurisdiction of the council, which Bacon says "subsisted by the ancient common laws of the realm,"² was to encroach upon the ancient inferior tribunals, and such encroachment led to the enactment of a series of restraining statutes that extend from the reign of

The Tudor monarchy.

Original jurisdiction of the king in council.

¹ *Essay on the Original Authority of the King's Council*, p. 34.

² "History of Henry VII.," Bacon, *Works*, i. 332.

Jurisdiction
of council
first nar-
rowed, then
widened by
statute.

Edward I. to that of Henry IV.¹ With the reign of Henry VI. a new legislative policy begins, whose aim was not to narrow the criminal jurisdiction of the council, but to give to it wider expansion. When, in the latter part of that reign, the ordinary administration of law gave way under the strain which the turbulence of the times put upon it, Parliament authorized the council to draw before it all persons and all causes that could not be dealt with in the ordinary tribunals.² When the turbulence, the lawlessness, the uncertainty existing at the beginning of Henry VII.'s reign are taken into account; when the fact is remembered that the evils of livery and maintenance were still in full vigor to hinder local administration of existing laws, it is not hard to understand why the extraordinary criminal jurisdiction of the council, which Edward IV. had abused, should have been again invoked, as in the days of Henry VI., in the interest of order against anarchy. That such was the motive of the famous act of 3 Henry VII., c. 1, is clearly revealed by its terms. In the midst of all the doubt and difficulty that learned refinement has thrown around the meaning of that act, it is safe to assume that it was not intended to create a new tribunal, or even to vest in the council a fresh jurisdiction.³ The soundest critics agree in the conclusion that it was only intended to invigorate

Act of 3
Hen. VII.,
c. 1, redefin-
ing powers
of council.

¹ A series of petitions begin as early as 1351 against the judicial usurpations of the council. See *Rot. Parl.* ii. 228, 339, 295. In 1390 the commons petitioned that no one should be summoned before the chancellor or the council by the writ *quibusdam de causis* to answer in any case in which the common law gave a remedy. *Rot. Parl.* iii. 267.

² See Act of 31 Hen. VI., c. 2, enlarging the powers of the council so that it might deal with those great offenders who overawed the ordinary tribunals. Dicey, *The Privy Council*, p. 72.

³ For the older literature as to the history of the star chamber, see Hudson, "Treatise on the Star Chamber," in *Collectanea Juridica*, vol. ii.; Sir Thomas Smith, *Commonwealth of England*, bk. iii., cap. i.; "History of Henry VII.," Bacon, *Works*, i. 334; Hale, *Jurisdiction of the House of Lords*, c. v. For the modern literature, see Reeves, *History of English Law*, iv. 205-212; Palgrave, *Essay on the Original Authority of the King's Council*; Sir J. F. Stephen, *History of the Criminal Law of England*, i. 166-184; Dicey, *The Privy Council*, pp. 94-115; Gneist, *History of the English Constitution*, pp. 504-513.

and emphasize by parliamentary sanction the ancient prerogative criminal jurisdiction of the crown, which, as early as the reign of Edward III., we hear of the "chancellor, treasurer, justices, and others, exercising in the *chambre des estoiles* at Westminster." The intention of Henry's statute must have been simply to revivify and define this ancient jurisdiction, and at the same time to commit its exercise as a special duty to a committee of the council composed of those specially named in the act. Of the special tribunal thus organized Bacon writes, "And as the chancery has the praetorian power for equity, so the star chamber has the censorian power for offenses under the degree of capital."¹ As the elastic jurisdiction of the chancellor grew and widened in civil matters so as to meet the ever expanding wants of litigants, so the extraordinary jurisdiction of the council in criminal matters so widened as to meet the endless demands of despotic authority. The powers of the special committee or court, organized under the act of 3 Henry VII., c. 1, after maintaining a separate existence for about fifty years, fell back towards the close of the reign of Henry VIII. to the general body of the council. The act of 31 Henry VIII., which gave to the royal proclamations the force of law, provided that offenders against them might be punished by the ordinary members of the council, together with certain bishops and judges, "in the star chamber or elsewhere." While the "censorian" powers of the special committee were thus falling back to the main body of the council itself, those powers were themselves expanding far beyond the statutory limits originally assigned to them. When it became convenient for the Tudor despotism to extend the criminal jurisdiction of the council over offenses not named in the act of 3 Henry VII., c. 1, cognizance of them was simply assumed, and those who presumed to contend that jurisdiction was limited by the act were not only ignored,

Vested in
special
committee.

Powers of
special
committee
revested in
council.

¹ "History of Henry VII.," Bacon, *Works*, i. 333.

Court in its
final form.

Its
procedure.

Henry VII.
and his
threefold
claim of
title.

but sharply reprimanded.¹ Thus it appears that the court of star chamber as finally organized was nothing more nor less than the whole council sitting judicially; and its jurisdiction as then exercised was practically unlimited. It is now no question of what it had a right to do, but of what it did. In its procedure it disregarded the common law, it dispensed with trial by jury, it accepted report in lieu of the testimony of witnesses, it employed torture, and it could pronounce any judgment short of that of death.² Such an institution, although it may have been employed in the early Tudor days for the suppression of anarchy and the maintenance of order, finally proved itself to be equally efficient as an engine of tyranny, which forced alike the peasant and the noble, the law courts and the Parliament, to crouch at the feet of its irresistible authority.

By his victory at Bosworth, Henry VII. was brought face to face with the double task of founding a dynasty and of maturing and expanding the new monarchical system Edward IV. had inaugurated. Bacon, in his history, tells us that "there were fallen to his lot, and concurrent in his person, three several titles to the imperial crown. The first, the title of the Lady Elizabeth, with whom, by precedent pact with the party that brought him in, he was to marry. The second, the ancient and long-disputed title both by plea and arms, of the House of Lancaster, to which he was inheritor in his own person. The third, the title of the sword of conquest, for that he came in by victory of battle, and that the king in possession was slain in the field."³ In the midst

¹ See Lord Chancellor Egerton's statement as to reprimands actually administered when "Mr. Sargeant Lovelace put his hand to a demurrer in this court for that the matter of the bill contained other matters than were mentioned in the statute 3 Hen. VII., and Mr. Plowden, that great lawyer, put his hand thereto first, whereupon Mr. Lovelace easily followed." Hudson *Collectanea Juridica*, ii. 80.

² While its decrees seem to have been lost, the pleadings in the star chamber are in the Record Office.

³ "History of Henry VII.," Bacon, *Works*, i. 315.

of the embarrassment that surrounded each of his claims, Henry assumed the crown, and, as soon as his coronation was over, he summoned a Parliament to which he boldly announced that "he had come to the throne by just title of inheritance, and by the sure judgment of God, who had given him victory over his enemies in the field." To allay such apprehension as the last statement was likely to excite, he added that all might "enjoy his rights and hereditaments, with the exception of such persons as in the present Parliament should be punished for their offenses against his royal majesty."¹ At this stage of the proceedings a serious question arose which led to the declaration of an important principle of constitutional law. In the preceding reign not only had Henry been attainted, but more than half of the peers now summoned, as well as a large number of those who composed the lower house. The suggestion was made that the attainder of the king could not be reversed in the usual manner, because while he was under the ban he could not lawfully exercise any of the functions of royalty. In order to remove that difficulty from the path of legislation, the judges were assembled by Hussey, Chief Justice, who induced them to agree that "the descent of the crown of itself takes away all defects and disabilities arising from attainder, and therefore that the act of attainder must be considered as already virtually reversed."² It was at the same time declared, however, that attainders of subjects could be removed only by act of Parliament.³ When all legal incapacities were thus eliminated, Parliament simply declared, as to the new king's title, that "the inheritance of the crown should be, rest, and remain, and abide in the most royal per-

His declaration in Parliament.

Descent of crown removes all effects of attainder.

Parliament's declaration as to title.

¹ *Rot. Parl.* vi. 268. See also Lingard, iii. 298.

² Year Book, Tenn. Mich., 1 Hen. VII. 5. "But nevertheless, for honour's sake, it was ordained by parliament, that all records wherein there was any memory or mention of the King's attainder, should be defaced, cancelled, and taken off the file." Bacon, *Works*, i. 318.

³ As to the whole transaction, see Hussey's life in Campbell, *Lives of the Chief Justices*, i. 162.

Security of
subject
under king
de facto.

New
nobility.

Henry VII.
and
Parliament.

His
financial
policy.

son of the then sovereign lord, King Henry VII., and the heirs of his body lawfully coming perpetually with the grace of God so to endure, and in none other.”¹ The act of 2 Henry VII., c. 1, provides that “no person attending upon the king and sovereign lord of this land *for the time being*, and doing him true and faithful service, shall be convicted of high treason by act of Parliament or other process, nor suffer any forfeiture or punishment; but that every act made contrary to his statutes shall be void and of no effect.”² The decay of the baronage, which had been gradually brought about by the wreck of feudalism, the extinction of the greater families, and the breaking up of great estates, Henry showed no disposition to check or repair. His coronation was attended by only three creations, and the new nobility that grew up under him and his successors was composed of new men, creatures of royal favor, who assumed the rôle rather of courtiers than of parliamentary barons. Such of the older nobles as the Percies, the Nevilles, and the Howards were held in check by the advancement of men like Morton, Fox, Wolsey, Cromwell, Cecil, Bacon, and Walsingham.³

The policy of Henry VII. toward Parliament as a whole was simply a repetition of that of Edward IV. Like Edward, Henry was willing to summon Parliament only on rare and critical occasions, when it was necessary to draw strength from its authority or revenue from its bounty. Like Edward, Henry looked to Parliament for a recognition of his title, for a grant of tonnage and poundage for life, and for bills of attainder from which he could enrich himself from the spoils of his enemies. Strengthened by such a beginning, it seemed to be the prime object of his policy to render himself inde-

¹ *Rot. Parl.* vi. 270; 1 Hen. VII., c. 1.

² As to the inability of this act to bind future Parliaments, Bacon says, “For a supreme and absolute power cannot conclude itself, neither can that which is in nature revocable be made fixed.” *Works*, i. 256.

³ The Tudors, with scarcely an exception, restricted their creations to the old knightly families.

pendent of Parliament by reducing his expenditures to the smallest possible amount on the one hand, and by increasing his revenues on the other, by the enforcement of all kinds of obsolete feudal forfeitures and amercements, and by a revival of that odious form of royal taxation known as benevolences.¹ During the twenty-four years of his rule, Henry summoned Parliament only seven times, and nearly all those meetings were called in the first half of his reign. During his last thirteen years, Parliament was summoned only once.²

Benevo-
lences.

Just as the long night of political reaction, coextensive with the supremacy of the York and Tudor monarchy, began to settle down like a blight upon the growth of the English constitution, the dawn of the Renaissance began to break upon the life of the English people. While Edward IV. and Henry VII. were fastening on the island kingdom that system of absolutism which had begun to prevail throughout the continental nations, the main body of the people were beginning to be stirred by the spirit of that new and marvelous era of national awakening generally known as the English Renaissance, — a term that must not be confined to the mere revival of learning, but so expanded as to embrace the entire process of mental and material development that brought to the English people its new conceptions of philosophy and religion, its new understanding of government and law, its reawakened interest in the arts and sciences, its new-born activity in commerce and manufacture, as well as that spirit of discovery and adventure that widened its destiny through conquest and colonization in another hemisphere. During the period in which

The
English
Renaissance.

¹ In 1490 and in 1497, when general subsidies (one of a novel character) were levied upon the nation, serious insurrections occurred; the first in the north and last in Cornwall, which was suppressed only after great bloodshed. See Lingard, iii. 314, 324. In order to remove the irritation produced by the pressure of general taxation, Henry seems to have resorted, with the aid of "Morton's fork," to the system of benevolences under which the burden of taxation fell mainly upon the wealthier classes. See Dowell, *History of Taxation*, i. 127-129, 200.

² The last Parliament called was that of 1504.

Overthrow
of parlia-
mentary
institutions
on the
Continent.

Character
of the
struggle in
England.

Older forms
of constitu-
tional life
never abol-
ished.

Henry VIII.
and the
break with
Rome.

Edward IV. was overawing the law courts and trampling upon the Parliament, the shining seed points of light, out of which the new life was to spring, were being sown amid the embers of the dying medievalism. The wave of reaction that broke upon England at Edward's accession was a part of the general tendency that characterized the politics of the sixteenth century. With the close of the Middle Ages, every effort that had been made in the direction of representative government upon the continent of Europe came to an end. Then it was that the free constitutions of Castile and Aragon were overthrown by Charles V. and Philip II.; then it was that the States-General of France met for the last time (1614) before their final meeting (1789) upon the eve of the French Revolution. With the accession of the House of York the English national assembly fairly began that prolonged struggle with the growing despotism of the monarchical system which upon the Continent proved strong enough either to sweep away or to reduce to empty forms all parliamentary institutions for nearly two centuries. In England, whose insular position obviated the necessity for standing armies,¹ the monarchy, armed only with moral force, never attempted to end the existence of the Parliament. The new system of absolutism reëstablished by the House of York and perpetuated by that of Tudor did not aim at the abolition of the older forms of constitutional life by which the monarchy had been fettered for more than a century; it simply strove to extinguish forever the vital spirit which, in the better days, had made them actual restraints upon the royal authority.

13. Great as was the progress made by the New Learning during the reign of Henry VII., under the lead of Grocyn, Colet, More, and Erasmus, the group of scholars of which they were the central lights remained a small one until after the accession

¹ No such thing as a standing army existed until after the Commonwealth and not until after the French Revolution and the Peninsular War did the nation become reconciled to its existence.

of Henry VIII. Then it was that the circle widened; then it was that the "new order" began in earnest; then it was that England, thus ushered into the new era, definitely entered upon a career of intellectual development abreast with the foremost of the continental nations. At the dawn of that era, England was still a member of that vast and shadowy Christian monarchy known as the Holy Roman Empire, whose sway was supposed to be universal. The chiefs of that comprehensive society were the Roman emperor and the Roman pontiff, — the one standing at its head in its temporal character as an empire, the other standing at its head in its spiritual character as a church.¹ The medieval claim of papal supremacy has thus been restated by a great English cardinal: "The supreme civil power of Christendom was dependent on the supreme spiritual authority. The pontiffs created the empire of the west; they conferred the imperial dignity by consecration; they were the ultimate judges of the emperor's acts, with power of deprivation and deposition."² This supremacy, which the pope claimed not only over the emperor, but over all other Christian princes, naturally assumed a feudal shape. The theory was that all Christian princes stood to the Roman pontiff as great vassals to a supreme lord or suzerain, and as such supreme lord the pope claimed the right to enforce the duties due to him from his feudal subordinates through an ascending scale of penalties culminating in the absolution of the subject from the bonds of allegiance, and in the deposition of the sovereign himself. Such were the claims of the papal power, and such its resources when John entered the lists against Innocent III.; such were its claims and resources when Henry VIII. entered the lists against Clement VII. By the middle of the twelfth

Holy
Roman
Empire.

Theory of
medieval
empire.

¹ See Bryce, *The Holy Roman Empire*, and the brilliant review of that work by Edward A. Freeman, in his *Select Historical Essays*.

² Monograph by Cardinal Manning, entitled *The Pope and Magna Carta*, published first in England and then reprinted in Baltimore in 1885.

System of
appeals.

century a comprehensive system of appeals had been built up from the bishops' courts to the pope, and in that way the whole of Western Europe was drawn within the jurisdiction of one tribunal of last resort, the Roman *curia*.¹ In a matrimonial cause involving the validity of a royal marriage, when the result might affect the legitimacy of the issue, and in that way the peace of the nation, the pontiff claimed that it was a matter of the last importance to have all questions passed upon by the one authority whose judgment was entitled, in theory at least, to universal acceptance. Wolsey attempted

Wolsey and
the divorce.

to solve the problems involved in the divorce of Henry VIII. from Catherine of Aragon by virtue of his legatine authority, and his failure² in May, 1527, to secure a favorable issue, resulted in his overthrow in 1529,³ — an event that marks the termination of the rule of the great ecclesiastics who, since the accession of Henry VII., had dominated at the council board. Wolsey's successor was Thomas Cromwell, who urged the king to solve the problem of the divorce by disavowing the papal supremacy, and by declaring himself the head of the Church of England,⁴ a position which would leave him free to apply for relief to his own ecclesiastical tribunals. In the presence of such a proposal even Henry faltered. He had no personal sympathy whatever with the new movement that threatened to wreck the spiritual unity of the medieval empire, and he had no mind to break with the papacy until

Cromwell's
policy of
secession.

¹ See above, p. 128.

² The results of the victory of Pavia in 1525 had placed the pope at the mercy of Catherine's all-powerful nephew, the emperor, — the sacking of Rome in May, 1527, had left him a prisoner in the Castle of St. Angelo. Pallavicino, pp. 242-246.

³ In October, 1529, the attorney-general filed two bills against him, charging him with having violated, as legate, the Statute of Praemunire (16th of Richard II.). He pleaded guilty and threw himself on the king's mercy. Cavendish, p. 250.

⁴ Pole (*Apologia*, pp. 121-123) gives the account of what occurred upon the authority of Cromwell and others. Cromwell is reported to have said to Henry in conclusion, "Vindices ergo quod est proprium Regii nominis, ut sis caput in tuo regno, et solum caput." In Baily, *Life of Bishop Fisher*, p. 89, the suggestion as to the new form of the king's title is attributed to Cranmer.

he had exhausted every possible means to prevent a disputed succession by obtaining a divorce from the only tribunal whose decree could command anything like general acceptance. Not until Henry's policy of menace and coercion had failed were Cromwell's decisive measures permitted to begin. That policy was inaugurated in the Reformation Parliament that met on the 3d of November, 1529, and was dissolved on April 14, 1536. Through the acts of that Parliament it was that the papal overlordship was finally overthrown, the royal supremacy fully established, and the clergy reduced to a state of abject submission at the feet of the monarchy. The first session opened with an attack on the clergy, in the form of a petition from the commons to the king in which were summarized all grievances and abuses that could then be charged upon the administrators of the Anglican church; in the second, Henry drew nearer to Cromwell's policy by forcing convocation to admit the king's headship of the church, with a qualification; in the third, a conditional statute was passed forbidding the payment of annates, and authorizing the consecrating of bishops without papal authority, and an absolute one forbidding convocation to legislate without royal license; in the fourth, appeals to Rome in certain cases, including marriage and divorce, were forbidden, it being provided that in all such cases whether affecting the king or his subjects the hearing should be had in the king's courts, temporal and spiritual, and not elsewhere; and furthermore that the course of appeal should be from the archdeacon to the bishop, and from the bishop to the archbishop of his province; and in any case touching the king or his successors, the appeal should be to the upper house of convocation; in the fifth, all appeals to Rome and the payment of Peter's pence were forbidden, the statute of annates being reenacted with a provision authorizing the nomination of bishops by *congé d'élire*, the method employed to the present day; in

Reformation Parliament, November, 1529.

Summary of the work of its six sessions.

Act of
Supremacy,
the culmi-
nation.

Single
allegiance.

Succession
act and
supremacy
oath.

Cromwell
vicar-
general.

the sixth, the work of separation was completed by the Act of Supremacy.¹ The fact above all others this parliamentary assertion of the royal supremacy was intended to establish was that, by the final secession of England from the great Christian commonwealth of which the pope was the spiritual head, the dual allegiance existing under that system was completely extinguished; that every kind of allegiance, spiritual as well as temporal, was now concentrated in the head of the state as king and pontiff. In order to pave the way for the recognition of that far-reaching change, it was necessary to compel every subject to swear to his belief in the reality of the king's new pretensions in the succession oath,² the refusal of which was declared to be treason. To remedy defects in that oath was passed 26 Henry VIII., c. 2, which put its legal authority beyond all question. An additional act was then passed, making the denial of the supremacy treason under which it was not necessary that positive guilt should be shown; it was only necessary that a man should refuse to give satisfactory answers to such questions as should be put to him in order to incur the guilt of treason.³

To enable the crown more efficiently to exercise the great mass of duties cast upon it by the ecclesiastical supremacy, Henry's first step was to appoint Cromwell, the architect of the new order, its chief administrator with the title of vicar-general, "with all the spiritual authority belonging to the king as head of the church."⁴ The Parliament of

¹ For the best summary, see Amos, *Reformation Parliament*.

² Generally taken by all, including the universities and convocations (Wilkins, *Concilia*, iii. 771, 774, 775), with the notable exceptions of Bishop Fisher and Sir Thomas More, whose refusal was followed by imprisonment. As to the examination of More, see his *Works*, pp. 1429, 1447.

³ As to that act (26 Hen. VIII., c. 13) under which More, Fisher, the Carthusians, and many others were convicted, see Lingard, v. 40, 41; Amos, pp. 144-148. As to More's warning to Fisher on this point, see *State Papers*, i. 434.

⁴ St. 31 Hen. VIII., c. 10; Wilkins, *Concilia*, iii. 784. The ecclesiastical courts were, however, permitted to retain their jurisdiction, each judge making an addition to his style of *auctoritate serenissimae regiae majestatis in hac parte legitime fulcitus*. See Amos, p. 283, and note 2.

1539, called to hush religious discord, — after giving the king's proclamations the force of law,¹ and authorizing the suppression of the greater monasteries,² — closed the doctrinal legislation of the reign by the enactment of the Statute of the Six Articles,³ fixing the standard of orthodoxy, in which it was declared: 1. That in the sacrament of the altar is really present, under the form of bread and wine, the natural body and blood of Christ, which, after consecration, remains but the substance of Christ. 2. That communion in both kinds is not necessary to salvation. 3. That it is not permitted to priests, after their ordination, to marry and have wives. 4. That vows of chastity ought to be observed as perpetual obligations. 5. That private masses ought to be continued for godly consolation and benefit. 6. That auricular confession to a priest must be retained and continued. That Cromwell should have undertaken to prostrate the church at the feet of the monarch is not so remarkable as that he should have essayed such a task with the aid of the Parliament. So far from shrinking from an appeal to the estates, it was the essence of his policy to call them together year after year, and to force upon their attention every possible question to which he desired to add the forms of legality or the apparent sanction of popular approval. When that series of royal edicts, over which was thus thrown the thin veil of national assent, are examined as a connected whole, the fact appears that Cromwell permitted nothing to rob his work of the merit of completeness. Upon the abnormal aggregation of civil powers, which the growth of the conciliar system had concentrated in the hands of the crown, the absolute control of the entire ecclesiastical system was superimposed. From its high place as an estate of the realm the church was reduced to a mere department of state; its wealth was

Six
Articles.

Parliament
tool of the
crown.

Church a
department
of state.

¹ 31 Hen. VIII., c. 8.

² 31 Hen. VIII., c. 13.

³ 31 Hen. VIII., c. 14. It received the royal assent June 24, 1539, and took effect July 12.

laid at the feet of the king, while its ministers, from the highest to the lowest, were made to feel that their right to exercise their spiritual functions depended alone upon the royal authority, — an authority that claimed the supreme right not only to prescribe the forms of worship, but also to define, through the agency of Parliament and convocation, principles of belief, and in that way to fix the difficult line then dividing heresy from orthodoxy.

Henry's
secular
legislation.

Relaxation
of feudal
restraints.

Act as to
uses and
wills.

The absorbing interest naturally centering in Henry's ecclesiastical legislation should not be permitted to exclude all interest in his secular legislation, especially that part of it which facilitated the important changes in the law of real property that happily followed the transfer of the vast estates that passed first from the monasteries to the crown, and then from the crown to lay subjects. Land thus became to an extent never known before the subject of bargain and sale, and out of that condition grew the necessity for a relaxation of the feudal restraints that had so long hindered its alienation. The right of devise, practically extinguished by feudalism, was in a measure revived by the growth of the power of the chancellor to compel the feoffee to convey to the person named in the will of the *cestui que use*.¹ To modify the evils growing out of that invention was passed "An Act Concerning Uses and Wills," whose primary purpose was, by joining the possession to the use, to abolish the distinction between the legal and beneficial ownership, and in that way to make the ostensible tenant also the legal tenant.² While the immediate effect of that statute was to give validity to "bargains and sales,"³ not until the passage of 32 Henry

¹ As to the growth of the equitable jurisdiction of the chancellor over uses, see Digby, *Law of Real Property*, pp. 321-326.

² Efforts had long before been made to protect creditors, the king, and the feudal lords against the effects of feoffments to use by 1 Rich. II., c. 9; 1 Rich. III., c. 1, and by 4 Hen. VII., c. 17.

³ In order to prevent secret conveyances of this character a second act was passed in the same year providing for their enrollment.

VIII., c. 1, was the power of devising interests in land by will fixed upon a firm legal foundation. To facilitate the transfer of land by fixing a limit within which certain suits concerning it should be brought, was enacted 32 Henry VIII., c. 2, known as the Statute of Limitations.¹ As restraints upon alienation were passed 23 Henry VIII., c. 10, prohibiting all gifts of land to what were then and since known as superstitious uses; and 32 Henry VIII., c. 31, restricting the method of conveying known as common recoveries by the proviso that all such recoveries had by the assent of parties against the life-tenant, tenant by the courtesy, and others should be void as to those in reversion or remainder without their consent, unless it was by a good title.²

Act establishing right of devise.

Statute of Limitations.

Superstitious uses and common recoveries.

How to provide for the permanency of his work, how to secure the stability of the throne during the bitter strife that was sure to follow the transfer of the vast powers concentrated in his own strong hands to those of his infant successor, were the perplexing problems that vexed the king's life as it drew to a close. The three memorable acts³ regulating the succession during Henry's reign removed any doubt that might have remained as to the fact that the crown cannot "descend from ancestor to heir in a certain established course of descent," where there is an "act of the legislature intervening." Under either theory the right of Edward was perfect. He was not only Henry's lawful male heir, but his right to the succession had been expressly recognized not only by the act of 28 Henry VIII., c. 7, but also by the subsequent act of 35 Henry VIII., c. 1, which, after affirming his right, put in the

Henry's final arrangements.

His three succession acts.

¹ The principle of that statute had already been established in the statute of non-claim (4 Hen. VII., c. 24). Reeves, *History of English Law*, iii. 310, note a.

² From the time of "Taltarum's Case" (12 Edw. IV.), the fictitious suits known as common recoveries had been employed as a method of conveying land, and they continued to be so employed down to 1834, when they were abolished by 3 and 4 Will. IV., c. 74.

³ 25 Hen. VIII., c. 22; 28 Hen. VIII., c. 7; 35 Hen. VIII., c. 1. For a detailed history of these acts, see Sir Michael Foster, *Crown Law*, pp. 406 sq.

Final dis-
position
by will.

Edward VI.
and the
English
Reforma-
tion: mi-
norities of
Henry III.

entail, next after the lawful issue of the king and Prince Edward, first Mary and then Elizabeth, subject to such conditions as the king by his letters patent or his last will might appoint. After supplementing that arrangement by a will providing that — on the failure of issue of his three children — the crown should pass to the heirs of his younger sister Mary, duchess of Suffolk, to the detriment of those of his elder sister Margaret of Scotland,¹ Henry named the sixteen executors, who were to constitute the council of regency during the minority, a council whose members were drawn in such equal proportions from the ranks of conservatives and reformers as to warrant the hope that the influence of the one would stand as a check upon that of the other.

Edward III.

Richard II.

14. The common law neither contemplated nor provided for a minority, for the reason, no doubt, that under the ancient elective system the king was supposed to be adult and personally competent to govern.² The first regency that occurred after the Conquest grew out of the accession of Henry III., just after the completion of his tenth year. How at that time the royal authority was vested in the earl Marshall, the elected representative of the baronage, who carried on the government under the title of *rector regis et regni*, has been explained already. After the deposition of Edward II., the first since the Conquest, and the election of his son, then in his fourteenth year, Parliament was a second time called upon to constitute a regency, a duty discharged by the appointment of a standing council of four bishops, four earls, and six barons, who, under the lead of the earl of Lancaster, the king's cousin, were to advise in all matters of government.³ Although Richard II. was at the time of his accession only eleven

¹ *Foedera*, xv. 114–117. As to the vexed questions involved in the alterations of the will and its valid execution, see Lingard, v. 212 sq. and notes; Blount, *Reformation of the Church of England*, ii. 6; Bailey, *Succession to English Crown*, pp. 156–164.

² Coke tells us why the king cannot be a minor. *Co. Litt.* 43.

³ *Rot. Parl.* ii. 52; Knyghton, col. 2556.

years old, no personal regent was appointed. The day after his grandfather's death the first king to succeed under the new doctrine of representation took the great seal from the hands of its keeper and passed it over to his uncle, the duke of Lancaster, who, four days later, passed it to the bishop of St. David's, who, by virtue of its possession, under the subtle legal theory then in vogue, was able to legalize all acts of government. The lords then limited that arrangement by the appointment of a council of twelve, without whose concurrence nothing was to be carried into effect.¹

At the accession of Henry VI., Parliament dealt with the fourth minority since the Conquest by ignoring the directions of the dead king, and by setting up in their stead an arrangement of its own under which the duke of Bedford (and in his absence the duke of Gloucester) became protector and defender of the realm with the aid of a council of sixteen, afterward constituted to aid him in carrying on the government.²

The brief and tragic reign of the infant King Edward V. opens with a struggle for the regency between the queen-mother and the duke of Gloucester, who, in May, 1483, was declared "protector of king and kingdom" by an irregular assembly of magnates and citizens.³ By that time the following principles of constitutional law seem to have been distinctly recognized: (1) That to Parliament as a whole belonged the exclusive right to constitute a regency, whenever the king from infancy or mental incapacity was personally incapable of performing his functions; (2) that the king did not possess the power to constitute, "by his last will nor otherwise," a regency during the minority of his successor, "without the assent of the three estates"; (3) that neither the heir presumptive nor any other member of the royal house had the

Henry VI.

Edward V.

Four principles then distinctly recognized as to regencies.

¹ *Rot. Parl.* iii. 386.

² *Lords' Report*, i. 368. As to the admonition of the lords to Gloucester, as to the nature and extent of his powers, see *Rot. Parl.* iv. 326.

³ *Rot. Parl.* vi. 240, 241.

right as such to claim the regency, although they were often chosen by reason of their nearness in blood; (4) that when a regency was to be constituted, it was usual for Parliament to vest the royal power either in some magnate individually, as guardian or protector, acting with the advice of a council, or in a council or regency without a dominant head. Such were the principles that stood forth as guides and as warnings to Henry VIII. And yet despite all the precautions taken under the provisions of the statute (28 Henry VIII., c. 7), the whole scheme was at once set aside by Edward Seymour, earl of Hertford, uncle of the infant king, who, in defiance of the terms of the will, and without the authority of Parliament, converted the carefully balanced regency into a protectorate with himself at its head. Upon the ground that business could not be conveniently dispatched unless some one "should be preferred in name and place before other, to whom, as to the head of the rest, all strangers and others might have access," it was resolved, that Hertford should be given the first place "as protector of all the realms and dominions of the king's majesty, and governor of his most royal person, with the special and express condition, that he shall not do any act but with the advice and consent of the rest of the executors."¹ Out of the shower of titles that ensued Hertford emerged as the duke of Somerset, his brother Thomas as Lord Seymour, while estates carved from the possessions of the monasteries passed to many, including Cranmer,² whose consecration as primate had taken place in March, 1533.³

From March 12, 1547, until October 14, 1549, Somerset was in full possession of the royal authority as protector.

¹ Records of the Privy Council, Edward VI., M.S. Council Office. The letters to foreign sovereigns announcing Henry's death went out "under the hand and subscription only of the Lord Protector."

² Strype, *Eccles. Mem.* II. i. 123, ed. 1822; Records of the Privy Council, Edward VI., M.S.

³ The necessary bulls were expedited on the 21st and 22d of February and the 3d of March of that year, and the consecration took place on the 30th of that month.

During that period it was that the English Reformation was fairly inaugurated through the joint efforts of Somerset and Cranmer, the former supplying the political authority, the latter the intellectual guidance that directed the English Church along the conservative path through which it approached without reaching the goal already attained by the continental Reformation. The character and scope of the jurisdiction which the patents to the bishops undertook to confer was clearly defined in that granted to Archbishop Cranmer, in which the fact was asserted that all kinds of jurisdiction were derived from the king as supreme head of the church, as well the right of the archbishop to ordain in his diocese as his right to hear causes in his ecclesiastical court.¹ The new doctrine thus emphatically asserted, that the crown and not the pope was the source of all ecclesiastical jurisdiction, soon received a fresh application through the order made by the council on May 4 for a general "visitation," a prerogative first transferred from the pope to the crown by the act of 25 Henry VIII., c. 21, § 20, soon followed by the Act of Supremacy (26 Henry VIII., c. 1), by which the right to visit and reform received a still wider application. In order that the subject of ecclesiastical reform might be discussed without danger, when Parliament met in November, it was necessary to repeal the bloody act of the Six Articles, in which Henry had attempted to put forth for the first time a positive statutory definition of heresy. As an abrogation of that system was passed 1 Edward VI., c. 12, in which not only the act of the Six Articles, but all "acts of Parliament and statutes touching, mentioning, or in any wise concerning religion and opinions" were repealed.² Thus was

Patents to
the bishops.

Crown, not
pope, source
of juris-
diction.

Right to
visit and
reform.

Six Articles
and other
acts
repealed.

¹ Cranmer's commission is entitled *Commissio regia archiepiscopo Cantuar. ad exercendum suam jurisdictionem*. Wilkins, *Concilia*, iv. 2; Burnet, *Collectanea*.

² For a masterful exposition, see Stephen, *History of the Criminal Law of England*, ii. 438-475.

Common
law as to
heresy
revived.

Mass super-
seded by
communion.

Treasons
act of 26
Hen. VIII.,
c. 13, re-
pealed, and
act of 25
Edw. III.,
c. 3, re-
stored.

Repeal of
act giving
royal pro-
clamations
force of law.

restored "the common law as to heresy," but the law so restored was understood to be the law as settled in Sawtre's case¹ at the beginning of the reign of Henry IV., which authorized the burning of a heretic by the writ *De haeretico comburendo* after a conviction by a provincial council. The mass so resolutely retained by the Six Articles was superseded by an act (1 Edward VI., c. 1)² which, after providing punishment for such as should revile the sacrament, enjoined the receiving of it under both kinds on the laity as well as the clergy, an act, after repeal and revival, still in force. While the Act of Supremacy remained unrepealed until the next reign, the famous treasons act (26 Henry VIII., c. 13) by which it was supplemented was now wiped out by 1 Edward VI., c. 12, providing that nothing should be held to be treason except offenses against the old treasons act of 25 Edward III., c. 3, and such as were created by its own terms. In 1552, some of the abolished treasons were reenacted and some new ones created, subject, however, to the all-important constitutional limitation providing that no person should henceforth be indicted or attainted for any kind of treason except on his voluntary confession, or upon the testimony of two lawful witnesses with whom the accused should be confronted on the trial.³ By the same act⁴ that abolished the new treasons created during the reign of Henry VIII. was repealed the act that had given to his proclamations the force of law. As to the chantry lands, — conveyed in trust to maintain the

¹ Sawtre was the first of the Lollards executed for heresy in England. He was executed by virtue of the king's writ, and not under the statutes. See Blackstone, *Comm.*, bk. iv., p. 46, and the criticism of his statement by Stubbs, *Constitutional History*, iii. 358 and note 4.

² That act confirmed a canon passed by convocation in December, 1547, providing for communion in both kinds. Strype, *Mem. Cranmer*, ii. 37; Wilkins, *Conc.* iv. 16.

³ The act of 5 and 6 Edw. VI., c. 2, provided for "two lawful accusers." As to the subsequent disregard of the act, see Foster, *Crown Law*, pp. 232-251.

⁴ 1 Edw. VI., c. 12. Despite the statute, however, the practice of issuing proclamations continued for a long time thereafter.

saying of masses for the benefit of the souls of the donors or their relations, — it may be said that in order to prevent the making in future of such grants, embracing not only “superstitious uses,” but also “good and charitable uses,” as afterwards defined, was passed the statute of 23 Henry VII., c. 10, declaring all such dispositions void. After the confiscation of the monastic property by acts passed in the twenty-seventh and thirty-second years of Henry’s reign, a retrospective act¹ was passed in the thirty-seventh of that reign giving the lands granted in trust as above described to the king. As the execution of that act was prevented by Henry’s death, another of the same character was passed in Edward’s first Parliament,² under which commissioners were appointed who soon placed the chantry lands under the control of the privy council. In the second session of that Parliament the work of the English Reformation was advanced by a statute declaring the marriage of priests to be lawful;³ and by the adoption of the changes of creed and ritual brought forward by Cranmer in the first Book of Common Prayer, which received the sanction of the state by being annexed as a schedule to the first Act of Uniformity⁴ providing that it should go into effect throughout the Church of England on the 9th of July, 1549. The supreme question involved was that of the communion, a question that had already been passed upon in the previous session by the act which, without materially changing the Catholic dogma, commended the giving of the elements in both kinds to clergy and laity. In order to adopt the change thus made to the service of the mass, an “Order of Communion” had been promulgated by the crown,⁵ prior to the adoption of the first prayer book, consisting of a brief service in English which, beginning after the communion of the priest, regulated the

Chantry
lands given
to king.

Marriage
of priests.

Act of
Uniformity
and Book
of Common
Prayer.

“Order of
Communion.”

¹ 37 Hen. VIII., c. 4.

² Edw. VI., c. 14.

³ 2 and 3 Edw. VI., c. 21.

⁴ 2 and 3 Edw., VI., c. 1.

⁵ By proclamation dated March 8, 1548.

administration of the sacrament to the laity. In the first or "high church" prayer book the communion service so arranged was retained without material alteration. Thus took place the memorable revision of the devotional system of the Church of England during the protectorate of Somerset, who was declared a traitor and sent to the Tower in October, 1549.¹

Fall of
Somerset,
1549.

Govern-
ment of
Warwick.

Merce-
naries
employed in
England.

No change
of policy.

Riot Act
of 3 and 4
Edw. VI.,
c. 10.

Second Act
of Uni-
formity.

The fall of the Protector was the consequence of his failure to cope with the agrarian difficulties resulting from the breaking up of the manorial system, an event that seriously affected the relation of landlord and tenant.² His place was taken by Warwick, who, as the chosen leader of the landowning gentlemen, crushed the revolt of the peasant class in the eastern counties by the aid of German and Italian mercenaries, now for the first time employed by English rulers for the coercion of English subjects. While the executors of Henry regained authority under the lead of Warwick, there was no change of policy, as he, no less than Somerset, was one of the "new men" whose fortunes had sprung out of the religious revolution to which all the nobles of the new blood were irrevocably committed. The despotic conciliar system Cromwell had organized was to be administered as before by a new master, as cautious and decisive as his predecessor had been imprudent and irresolute. His first measure was a riot act (3 and 4 Edward VI., c. 10), which made it felony for persons to the number of twelve or more to assemble for the purpose of abating the rents of farms or the price of provisions, for the destruction of houses or parks, or for the assertion of common rights. A bitter attack upon the prayer book of 1549 led to a second Act of Uniformity (5 and 6 Edward VI., c. 1), which provided that the second or "low church" prayer book should

¹ *Grey Friars' Chronicle*, Camden Society, p. 14.

² For details and authorities, see Taylor, *The Origin and Growth of the English Constitution*, ii. 121 sq.

take the place of the first on November 1, 1552.¹ While the archbishop was thus engaged in completing the revision of the church's devotional system, he was at the same time advancing the preparation of the famous formularies known as the Forty-two Articles (afterwards reduced to Thirty-nine), which were designed to end doctrinal controversy and to establish uniformity of opinion by virtue of authoritative definitions upon disputed questions sanctioned by both church and state.² After Edward's death these articles, promulgated in the last year of his reign, passed into an obscurity from which they did not emerge until five years after the accession of Elizabeth.³ The attempt made in this reign to codify the ecclesiastical laws of the realm, which the religious revolution had left in a state of great confusion, proved abortive. After an utter failure by crown and Parliament to provide a comprehensive ecclesiastical code which, like the prayer book and the Thirty-nine Articles, might have stood as an enduring monument, convocation contented itself with the enactment from time to time of such canons as the discipline of the church most urgently required.⁴ When, in May, 1553, it was clear that Edward was dying, Warwick, who had assumed the title of duke of Northumberland, was brought face to face with a catastrophe that threatened not only his personal fortunes, but those of the Reformation. The problem was, how to provide an heir to the throne that would be propitious to both. The means seized upon for the accomplishment of the end in view was a will to be made

The Forty-two Articles.

Attempt to codify ecclesiastical law.

Edward's death and the succession.

¹ A good account of the prayer book of 1552 may be found in Blount, *Reformation of the Church of England*, ii. 94-107.

² As to their making and promulgation, see Hardwick, *History of the Articles*.

³ As to their adoption by convocation, see Wilkins, *Conc.* iv. 237; Gibson, *Synod. Anglic.*, p. 145, ed. 1854. They were then submitted to the crown for ratification, according to the Act of Submission, and were so ratified under the great seal. Coke, *Int.* iv. 74.

⁴ As to the still-born production, known to the learned as "The Reformation of the Ecclesiastical Laws," see *Harl. MSS.*, p. 426; Blount, *Reformation of the Church of England*, ii. 112-115.

Lady Jane
Grey and
Dudley.

Will executed June
21. Edward died
July 6, 1553.

Mary and
the Catholic
reaction:
first two
stages of
English
Reformation.

by Edward, without parliamentary authority, naming as his immediate successor Lady Jane Grey, the granddaughter of Mary, duchess of Suffolk, who had been married to Guildford Dudley,¹ fourth son of Northumberland. This grossly illegal attempt to remove the prior claimants to the succession as settled by Parliament by a king still in his minority was earnestly opposed by the judges, the law officers of the crown, and the archbishop, as a desperate measure that would involve all concerned in it in the guilt of treason.² But boy as he was, and dying as he was, Edward was immovable. His zeal for the "religion" was such that he felt that everything must yield to the necessities of "his device for the succession," through which he confidently believed he could transmit the crown to a Protestant successor. On the 21st of June all the formalities incident to the execution of the will or letters patent³ were completed, and on July 6 Edward died. Although Northumberland was reluctantly supported at first by the council, backed by the foreign mercenaries and by the extreme Protestants, his whole incoherent and impracticable scheme collapsed in the presence of a popular outburst in Mary's favor, that sent him to the block, and with him the hapless girl he had involved in the toils of his ambition.

15. With the death of Henry VIII. ended the first stage of the English Reformation, consisting of the severance from the Roman see, by a political act, of a people impelled by a growing sense of nationality to assume absolute independence, without any departure whatever from the Roman dogma and ritual employed by the national church from the earliest times. With the death of Edward VI. ended the second stage, embracing the changes of dogma and ritual embodied under

¹ Celebrated May 25, 1553.

² Burnet, *History of Reformation*, i. 454.

³ See the copy printed for the Camden Society by Mr. John G. Nicols, *Letters Patent for the Limitation of the Crown: Queen Jane and Queen Mary*, Appendix. See also Bailey, *The Succession to the Crown*, p. 167.

the guidance of Cranmer in the prayer book and the Forty-two Articles, which, by virtue of the Acts of Uniformity, were made the standards of orthodoxy. Certain it is that the period occupied by the second stage was one of great want, misery, and administrative disorder, during which the cause was prejudiced by the selfish conduct of the knot of greedy Protestant nobles who at Henry's death seized upon the powers of the privy council, by means of which they completed the confiscation of the property of the church in order to enrich themselves, while they permitted the public treasury to become empty, the expenses of the court to be increased, the coinage to be debased, and the peasantry to be oppressed by a heartless policy of inclosures carried out in the interest of the landlords by the aid of foreign mercenaries. It is not therefore strange that when the upstart Northumberland, around whom had gathered the hate such a policy naturally engendered, attempted to consummate his selfish work by a grossly illegal attempt to transfer the crown itself to his own family, the nation should have risen in arms against him; and that when his puppet queen, Protestant as she was, was proclaimed, on the 10th of July, 1553, but "few or none said, God save her."¹

On August 3, Queen Mary, as to whose religious status there could be neither doubt nor question, after having been proclaimed by the council on the 19th of July, entered London with Elizabeth by her side amid the acclaim of the populace, and according to custom she proceeded to the Tower, where she found awaiting her upon the green an historic group of state prisoners,² among whom were the old duke of Norfolk and Gardiner, bishop of Winchester, who, after a rigid confinement of five years, now came forth to take the first place at Mary's side as the counselor who was to direct the con-

Mary proclaimed by the council.

¹ *Grey Friars' Chronicle*, p. 79; *Holinshed, Chronicle*, p. 1087.

² Renard to Charles V., Rolls House MSS.

Gardiner's
conserva-
tive policy.

Mary's
first Par-
liament.

Treasons
act of 25
Edw. III.
restored.

Queen's
legitimacy.

Repeal of
statutes as
to creed and
ritual.

servative policy that prevailed down to the Spanish marriage, and the subsequent domination of Philip and Pole. Gardiner — who had been sent to the Tower by Somerset, despite a memorable sermon against the papal and in favor of the royal supremacy¹ — returned to power, resolved to reestablish Henry's ecclesiastical system in the identical form in which he had left it. After the restoration of the bishops² who had been deposed and imprisoned in the preceding reign, and the execution of justice upon three of the ringleaders of the conspiracy against the queen,³ Mary's first Parliament, which met on the 5th of October, addressed itself under Gardiner's guidance to the task of wiping out only so much of Edward's ecclesiastical legislation as would make possible the restoration of the legal conditions as they existed in the last year of Henry VIII. The session opened with the ancient form of the mass, so long omitted, and the first act of the reign reestablished the law of treason as defined by 25 Edward III., by reenacting the repealing section of the act of Edward VI., with the addition of the words extending it to misprision of treason.⁴ The next act,⁵ in order to settle the question of the queen's legitimacy, after declaring the validity of the marriage of her mother with Henry, annulled the sentence of divorce pronounced by Cranmer, as well as all acts of Parliament that questioned her legitimacy. Then followed the act⁶ repealing nine statutes passed in Edward's reign, relating to creed and ritual, the marriage of priests, and the election of bishops, which may be enumerated as follows: the two Acts of Uniformity, and that authorizing the Ordinal

¹ Foxe, vi. 87-93, ed. 1838.

² As to the return of Bonner from the Marshalsea, see *Grey Friars' Chronicle*, p. 82.

³ Northumberland, Gates, and Palmer were executed for high treason on August 22.

⁴ 1 Mary, c. 1.

⁵ 1 Mary, sess. 2, c. 1. Nothing was said in the act as to the papal dispensation, an omission of which Pole afterward bitterly complained. See Strype, *Cranmer*, iii. 477, 478.

⁶ 1 Mary, sess. 2, c. 2.

(2 Edward VI. 1; 5 Edward VI. 1; 3 Edward VI. 12), the act authorizing the communion in both kinds (1 Edward VI. 1), the act authorizing the appointment of bishops without election (1 Edward VI. 2), the act for the limitation of holy days (5 Edward VI. 3), the act abolishing the old service books (2 Edward VI. 10), and the two acts permitting priests to marry (2 Edward VI. 21; 5 Edward VI. 12). By the express terms of the repealing act "all such divine service and administration of the sacraments as were most commonly used in this realm of England in the last year of the reign of our late sovereign lord, King Henry VIII., shall be, from and after the 20th day of December, 1553, used throughout the whole realm of England, and all other the Queen's Majesty's dominions." And the same rule was repeated in the next act,¹ which provided for the punishment of all who should molest priests "celebrating the mass or other such divine service, sacraments, or sacramentals, as was most commonly frequented and used in the last year of the reign of the late sovereign lord, King Henry the Eighth." While thus conserving and restoring Henry's work, Parliament was careful not to repeal the Act of Supremacy, and Mary accordingly retained the title of "Supreme Head" down to April 2, 1554,² a date subsequent to the arrangement of her marriage with Philip. That event marks the beginning of a new policy that culminated in the wiping out of the entire scheme of legislation through which the supremacy of the pope had been repudiated.

Henry's
form of
service re-
established.

Act of
Supremacy
not re-
pealed.

Cardinal Pole, the queen's second cousin once removed, who had been commissioned as legate³ the moment that

Cardinal
Pole.

¹ 1 Mary, sess. 2, c. 3.

² The first Parliament was summoned in the name of "Mary . . . Defender of the faith and of the Church of England and also of Ireland, in earth Supreme Head," a title retained in the first nineteen acts of the reign. On April 2, 1554, the title was changed by an omission of the last clause.

³ By Julius III., who at the same time sent from Brussels a secret agent, through whom Mary communicated to the pope and Pole her desire to reunite her kingdom to the Roman see. Pallavicino, ii. 397; *Quirini's Collection of Pole's Letters*, iv. 111.

Edward's death was known at Rome, although he was prevented by his attainder from entering the kingdom, soon journeyed as far as Flanders in order the more promptly to act as the queen's adviser. In April, 1554, the houses were called together, when the marriage articles, as proposed by the emperor and as modified by the queen's advisers, were submitted and the marriage bill passed so soon as the parliamentary forms could be complied with.¹ Then followed an act made necessary by the fact that Mary was the first queen regnant who had ever made good her title to the crown of England.² Some of the Protestant preachers had claimed that the rule of a woman was not only prohibited by the word of God, but that the laws of the land, made alone for kings, failed to recognize the prerogatives of queens. To remove all constitutional difficulties upon that score, an act³ was passed providing that "the royal power and dignities vested in a queen the same as in a king," and that all statutes applied equally to the sovereign, whether male or female. After the failure to secure the passage of four bills presented by the chancellor to regulate the succession, to restore the Six Articles, to reenact the statute *De haeretico comburendo*, and to restore the jurisdiction of the bishops,⁴ Parliament was dissolved on the 5th of May, and before the end of July the fateful union between Philip and Mary was celebrated at Winchester. Certain it seems to be that there was interference with the elections to the lower house of Parliament that met on the 12th of November, by means of circulars accompanying the writs, in which the crown, after declaring that no "alteration was intended of any man's possessions," directed the sheriffs, mayors, and others to admonish the voters to choose from

A marriage bill passed, April, 1554.

Also an act to legalize Mary's position as queen regnant.

Means to secure a compliant Parliament.

¹ The marriage bill passed by the 12th of April, 1 Mary, c. 11.

² As to Matilda's attempt to secure that position, see Taylor, *The Origin and Growth of the English Constitution*, i. 225 sq.

³ 1 Mary, sess. 3, c. 1.

⁴ The last two bills passed the commons, but were lost in the upper house.

among themselves "such as, being eligible by order of the laws, were of wise, grave, and catholic sort, such as indeed meant the true honor of God and the prosperity of the commonwealth."¹ Pole's attainder was promptly reversed, and on November 29 both houses resolved, with scarcely a dissenting voice,² to reacknowledge the papal supremacy; and they joined in a formal petition³ to Philip and Mary, praying that they would intercede with the legate for a national absolution, which he duly pronounced the next day.⁴ Passing, then, from form to substance, the new concordat thus entered into between the pope and the nation was carefully embodied in an act passed by the commons on the 4th of January, 1555, entitled "An Act repealing all Articles and Provisions made against the See Apostolick of Rome *since the twentieth year of King Henry the Eighth*, and for the establishment of all spiritual and ecclesiastical possessions and hereditaments conveyed to the laity."⁵ By that sweeping repeal all that remained of Henry's ecclesiastical legislation was swept away. Parliament was careful, however, to see that the consideration promised to the holders of church property was fully secured. To accomplish that end the clergy were required to state their claims in a petition⁶ and then to relinquish them. When Mary attempted to remodel the succession so as to destroy the rights of Elizabeth, the houses refused to repeal the two acts⁷ upon which her status depended only so far as they affected the papal prerogative; and the only concession that could be won in favor of Philip was a regency bill⁸ vesting in him the guardianship during

Papal
supremacy
reestab-
lished.

Contents
of act em-
bodying
new con-
cordat.

Security to
holders of
church
property.

Succession
and regency
bills.

¹ The royal circular is printed in Burnet, *Collectanea*.

² As to the two dissenting votes in the commons, see Strype, iii. 204; *Ep. Poli.* v., Appendix, 314.

³ See Foxe, *Acts and Mon.* vi. 571.

⁴ *Ibid.* vi. 572, as to the form of absolution used.

⁵ 1 and 2 Philip and Mary, c. 8.

⁶ Burnet, *History of Reformation*, i. 503. The petition is printed in the *Collectanea*.

⁷ 28 Hen. VIII., c. 7; 35 Hen. VIII., c. 1.   ⁸ 1 and 2 Philip and Mary, c. 10.

Heresy
statutes
revived.

Gardiner's
death.

Papal
prejudice
against
Pole.

Loyalty of
nation to
Elizabeth.

their minority of any children the queen might bear him. No such spirit, however, opposed the attempt now successfully made, after two failures in preceding parliaments, to revive the heresy statutes of the years 1381, 1400, and 1414,¹ the practical effect of which revival was to do away with the necessity for a writ *De haeretico comburendo* signed by the queen. On the 16th of January, 1555, Parliament was dissolved, and during the next month, under the authority of the revived statutes, the fires of Smithfield were lighted, and the bloody drama began. Not until the heresy statutes had been put into vigorous operation under Gardiner's personal supervision² did his death in November leave Pole, after the manner of Wolsey, the supreme counselor in all matters both of church and state. The end was to be failure and disappointment. As viewed by the violent orthodoxy of Paul, the more liberal theologians, led at that time by Contarini and Pole, were but little better than heretics. That prejudice against Pole and his work which Paul was induced to stifle for a moment manifested itself in no uncertain terms in the summer of 1557, when he revoked his legatine commission,³ against the protest of both queen and council, the moment that Philip succeeded in dragging England into war with the pope's ally of France. Thus at enmity with the pope, forsaken by Philip, and hated by the nation, the childless queen, who had struggled in vain to make her husband her successor, was doomed to see, as she sank into the grave, the tide of popular enthusiasm rising around Elizabeth, whose right to the throne every Parliament had protected against her designs, and whom the nation itself had guarded in the midst of every

¹ 5 Rich. II. 5; 2 Hen. IV. 15; and 2 Hen. V. 7, were revived by 1 and 2 Philip and Mary, c. 6.

² The heresy statutes were passed in December, 1554, and in the following January Gardiner presided at the trial of Hooper, Rogers, and others. Foxe, *Acts and Mon.* vi. 587, 598, 649.

³ Burnet, i. 546, and *Collectanea*; Strype, *Memoirs of the Reformation*, vi. 476.

peril as its deliverer. On the 17th of November, 1558, in the midst of the depression that followed the loss of Calais, Mary died, and a few hours later Pole, who had toiled in vain by her side, was no more.

Mary died
in Novem-
ber, 1558.

16. With the death of Mary ended the third stage of the English Reformation, the period of reaction during which the nation sought peace and order at the feet of the legitimate sovereign even upon terms that involved the surrender of the entire fruit of the religious revolution Henry had inaugurated, excepting only the ecclesiastical property, whose wide distribution had made it almost a national endowment. The fourth and last stage began with the accession of Elizabeth, upon whom devolved the difficult task of formulating and enforcing a political programme through which the nation was finally emancipated from papal and Spanish domination, and all parties and sects compelled to accept or acquiesce in a system of religious uniformity resting upon parliamentary enactments, and enforced with all the despotic authority of the conciliar system. Utterly devoid of the religious enthusiasm that had in turn driven Edward and Mary in opposite directions, and viewing all theological differences in a purely political light, the new queen came to her task with a mental equipment that harmonized perfectly with that of the wise and wary counselor who for forty years stood by her side. Foremost among that class of English statesmen known as "politicals," who accepted the new doctrine that every people possessed not only the right to determine for itself the form of the national belief, but also the right to enforce such belief as a matter of state policy, stood William Cecil, afterward Lord Burghley, whose one aim was to restore order and unity, and to build up the national power and influence at the sacrifice of every other consideration. To ward off probable dangers that might have resulted from a sudden breach with Spain and the papacy, the celebration of the

Elizabeth
and the
final set-
tlement.

William
Cecil, Lord
Burghley.

First
Parliament,
January,
1559.

Summary
of act re-
storing
royal
supremacy.

mass was permitted to go on;¹ a proclamation was issued on the day of Elizabeth's accession, forbidding any change or innovation until consultation could be had in Parliament, which met January 25, 1559. The first act to go upon the statute book was entitled "An Act to restore to the crown the ancient jurisdiction over the estate, ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same."² The contents of that act, wiping out the papal and reëstablishing the royal supremacy, may be summarized as follows: (1) The act of 1 and 2 Philip and Mary, c. 8, whereby Henry VIII.'s ecclesiastical legislation was swept away, was repealed, and ten of his acts were revived.³ (2) The persecuting statutes of 1381, 1400, and 1414, which Mary had revived, were also repealed. (3) The ground being thus cleared, the papal supremacy was expressly abolished in sweeping terms which made its exercise as illegal as it had been under Henry VIII.; and penalties in three grades were imposed upon all who should "by writing, printing, teaching, preaching . . . maintain or defend the authority" abolished by the act. (4) The provisions then made for the reëstablishment of the royal supremacy were of an unpersonal character, in order to escape the awkward dilemma that would have resulted from a simple revival of Henry's Act of Supremacy, and the consequent declaration of the queen as the "Supreme Head."⁴ Instead of again transferring the papal prerogatives to the sovereign personally, it was now declared that they should "by the authority of this present Parliament be united and annexed to the imperial crown of this realm." (5) The vast powers thus vested

¹ The queen was crowned with mass, January 20, 1559, and on the 25th Parliament was opened with the old form, except that the communion was administered in both kinds. The queen was to commune as she pleased. Strype, *Annals*, ii. 397; Burnet, *History of Reformation*, i. 565.

² 1 Eliz., c. 1.

³ 23 Hen. VIII., c. 9; 24 Hen. VIII., 12; 25 Hen. VIII., cc. 1, 8, 19, 20; 26 Hen. VIII., c. 14; 28 Hen. VIII., c. 16; 32 Hen. VIII., c. 28; 37 Hen. VIII., c. 17.

⁴ As originally introduced in the commons, the bill restored to the queen that title. See Strype, *Annals*, vol. i., pt. ii., p. 405.

in the crown, the sovereign was authorized to exercise through commissioners,¹ who were finally organized into the Court of High Commission, which as a corporate body undertook to discharge the corrective jurisdiction of the crown over "the ecclesiastical state and persons," clerical and lay.

(6) In order to make the new supremacy effective, an oath of allegiance and supremacy was provided, whose refusal disqualified any one from accepting any office under the crown or any benefice in the church, while those who were already in possession of such offices or preferments were upon a refusal of the oath liable to be deprived of them.² The logical sequence of the act reestablishing the royal supremacy was a

new Act of Uniformity, restoring the devotional system as established during the reign of Edward VI. A royal commission, after making only two material alterations, recommended the "low church" prayer book of Edward VI., which, after submission to the council, was attached as a schedule to the Act of Uniformity passed near the end of the session, and entitled "An Act for the Uniformity of Common Prayer in the Church, and Administration of the Sacraments."³

New Act of Uniformity and "low church" prayer book of Edward VI.

After the enactment of laws declaring that firstfruits and tenths should again be vested in the crown,⁴ that all religious houses refounded by Mary should be suppressed and their property given to the state;⁵ that the queen's title to the throne was as good as her father's or brother's had been, and as good as her sister's at any time since the passage of 35 Henry VIII.,⁶ upon which Elizabeth's right really rested; that any attack upon the queen's title by writing should be treason on a first conviction,⁷ — Parliament was dissolved on the 8th of May.

After enacting other important statutes,

Parliament dissolved, May 8, 1559.

¹ 1 Eliz., c. 1, §§ 17, 18.

² 1 Eliz., c. 1, §§ 19-29.

³ 1 Eliz., c. 2.

⁴ 1 Eliz., c. 4.

⁵ 1 Eliz., c. 24.

⁶ 1 Eliz., c. 3. See Sir Michael Foster's comments on the peculiar language of that act, *Crown Law*, p. 409.

⁷ 1 Eliz., c. 5. The act of 1 and 2 Philip and Mary, c. 10, was reenacted and applied to Elizabeth. Attacks by words were made treason on a second conviction.

Struggle of Elizabeth with Catholic party.

Regulation of worship assumed to be a state function.

Statutes to punish offense of nonconformity.

Outward conformity checked by papal brief.

By the Act of Appeals,¹ enacted by Henry VIII., and re-enacted by Elizabeth,² the theory of the identity of church and state was distinctly embodied in terms that declared that "both their authorities and jurisdictions do conjoin together, in the due administration of justice, the one to help the other." Proceeding upon that basis, the ecclesiastical legislation of Elizabeth assumed that the regulation of religious worship was a state function to be exercised through Parliament, and that all subjects who failed to accept or comply with the forms thus provided should be punished by the law of the state. It was further assumed that to acknowledge the right of the pope to interfere with such legislation was a step toward treason, and that to act by this command in opposition to the law of the land was actual treason.³ Upon these principles were framed the acts of Elizabeth designed to punish the offense of nonconformity to the Established Church, some of which were intended to apply to both of the resisting factions, while others were designed for special application to Roman Catholics, or to Protestant dissenters, in order to meet special emergencies. At the outset the worldly and tolerant spirit animating both Elizabeth and Cecil, which demanded only an outward conformity to the church establishment, refused to enter the sacred realm of individual opinion. Upon the part of English Catholics a disposition was manifested to meet that tolerant policy by outward conformity, which continued until it was suddenly checked in August, 1562, by a brief from the pope, forbidding their attendance at church, and denouncing their joining in the common prayer as schismatic. The sharp assault thus made upon Elizabeth's hopeful policy was promptly met by a memorable act⁴ that laid the foundation for a system of legal oppression

¹ 24 Hen. VIII., c. 12. See Amos, *Reform. Statutes*, pp. 256-262.

² 1 Eliz., c. 1.

³ See Stephen, *History of the Criminal Law*, ii. 477.

⁴ 5 Eliz., c. 1, and entitled "for the assurance of the queen's royal power over all estates and subjects within her dominions."

which English Catholics were forced to endure for nearly two centuries and a half. It provided for a commission of bishops and others to be appointed by the crown, who were authorized to tender the Oath of Supremacy (1) to all members of the House of Commons, to all who had ever been admitted to holy orders or to degrees in the universities, to schoolmasters, private tutors, barristers, and attorneys, as well as to all other persons engaged in the execution of the law; (2) to all who should openly disapprove of the established worship, or who should celebrate or attend any mass said in private. When Bonner, the deprived and imprisoned bishop of London, presented the question that Horne, bishop of Winchester, who tendered him the oath, was not a bishop,¹ the controversy as to the status of the new episcopate was cut short by an act² passed in the Parliament of 1566, "declaring the manner of making bishops and archbishops in this kingdom," employed since the queen's accession, "to be good, perfect, and lawful." When in 1570 Pius V. published the famous bull of excommunication and deposition,³ Parliament replied in two statutes passed for the queen's protection; the first⁴ to prohibit the publication of papal bulls; the second⁵ to punish those who should claim the crown during the queen's life. During the ten years that followed that enactment, existing laws were enforced with such severity against the Catholic population that many were forced to seek refuge beyond sea, while the Catholic priesthood, thinned by death and unrecruited by fresh ordinations, threatened to become extinct. To that sad condition of things were added the fresh

The counterblast.

Legal status of new bishops challenged.

Responses to bull of deposition.

¹ "After a long argument in Serjeants' Inn, all the judges agreed that Bonner had a right to an inquiry before a jury as to the matter of fact, whether Horne, at the time when he offered the oath, was or was not a bishop in the eye of the law." Lingard, vol. vi., Appendix, note 6, p. 668.

² 8 Eliz., c. 1. The main purpose of the act was to legalize retrospectively the Edvardian Ordinal used at the consecration of Parker and his associates.

³ Printed in Burnet, *Collectanea*.

⁴ 13 Eliz., c. 2.

⁵ 13 Eliz., c. 1.

cruelties resulting from the act ¹ of 1581, directed against the Jesuit invasion, under which Champion was tortured ² and convicted; ³ and the act of 1539, increasing the penalties of recusancy. ⁴

Struggle of Elizabeth with the Puritan party.

Its origin.

As the strict enforcement of the Acts of Supremacy prevented for a time the formation of sects outside of the state church, the first opposition to the established system came from within, from a church party which about the year 1564 was designated as Puritan, a term so extended a few years later as to embrace many who had then separated from the Church of England. In 1565 it was that the first coercive measures were taken against the Puritan sympathizers among the clergy who had for some time, with the connivance of some of the bishops, ventured to deviate from the uniformity established by law by refusing to observe many ceremonies they deemed either as superfluous or superstitious. To suppress such irregularities, the archbishop in the year last named put forward, without the royal sanction formally given, a set of regulations for the discipline of the clergy called "Avertisements"; and through the authority of the ecclesiastical commission many of the leading Puritan divines who still refused to conform were either deprived of their preferments or suspended from the ministry under threat of deprivation. Thus it was that the Puritans were driven to the open schism manifested by their withdrawal from the state church, and by the establishment of separate conventicles. In June, 1567, an assembly of that character which had met in Plummer's Hall in London was dispersed, and out of an hundred or more brought before the Court of High Com-

Driven to open schism and punished.

¹ 23 Eliz., c. 1, "to retain the queen's majesty's subjects in their true obedience."

² As to the history of torture in England, see Taylor, *The Origin and Growth of the English Constitution*, ii. 166, note 1.

³ State Trials, i. 1049, 1072; Bridgewater, pp. 219, 304.

⁴ 35 Eliz., c. 2. As to its effects, see Stephen, *History of the Criminal Law of England*, ii. 486.

mission, thirty or more were imprisoned, the first punishment to which Protestant dissenters were actually subjected.

In 1583 Archbishop Whitgift, a leader of the orthodox school, began, with the aid of the Court of High Commission permanently established not long after his consecration, that systematic attempt to punish such of the clergy as were imbued with Puritan principles which finally resulted in the bitter assault upon the bishops embodied in the series of pamphlets published under the pseudonym of Martin Mar-Prelate.¹ Under Elizabeth's Act of Supremacy five high commissions² were issued during the first twenty years of her reign, and then in December, 1583, another followed,³ creating the permanent body afterward known as "The Court of High Commission in Causes Ecclesiastical." By the terms of the instrument the forty-four commissioners appointed by it, twelve being bishops and three a quorum, were authorized "to inquire from time to time during our pleasure, as well by the oaths of twelve good and lawful men, as also by witnesses and all other ways and means you can devise, of all offenses," against the Acts of Supremacy and Uniformity, and especially as to "all heretical opinions, seditious books, contempts, conspiracies, false rumors or talks, slanderous words, and sayings," and the like. While a statutory limitation, in the form of a negative provision⁴ or definition, was imposed in cases of heresy, the commissioners were authorized to administer the hated *ex officio* oath, and to punish offenders "by fine, imprisonment, censures of the church, or by all or any of said ways," but not by death. The enforcement of such vast powers through inquisitorial means naturally excited resistance, and an appeal

Whitgift
and the
high com-
missions.

Mar-Prelate
tracts.

Permanent
Court of
High Com-
mission.

Ex officio
oath.

¹ The first of these were published in 1588. Strype, *Whitgift*, p. 288. For a full account of the whole series, see Maskell, *History of the Martin Mar-Prelate Controversy*, 1845.

² Neal, *History of the Puritans*, i. 330.

³ The text is published in Neal, i. 330-332.

⁴ § 36.

Conflict
with courts
of common
law.

Abolished
by Long
Parliament.

Constitu-
tion of the
council in
the days of
Elizabeth.

Divided
into com-
mittees.

to the courts of common law to restrain the commissioners within bounds. In the course of the legal contest recorded in Coke's Reports, the general nature of the ecclesiastical law,¹ the right of the commissioners to administer the *ex officio* oath,² and the right of the law courts to restrain by prohibition and to deliver by habeas corpus³ persons illegally imprisoned by the High Commission, were learnedly expounded. And yet, in spite of such opposition, the powers of the court continued practically unimpaired during the reigns of Elizabeth and James, and down to the sixteenth of Charles I., when it was abolished by the Long Parliament in an act⁴ declaring that it had exercised throughout a jurisdiction never conferred by the statute creating it.

However potent an entity the High Commission may have been, it must not be forgotten that it was simply an agency of the conciliar system, to whose supervision it was subject. From the picture of the council contained in the regulations drawn up by Edward VI. in 1553,⁵ it appears that the forty members of whom it was then composed, twenty-two being commoners, were divided into five committees, to each of which was assigned a definite class of official duties. The essence of the arrangement was that everything should be brought under the royal eye by the secretary as the channel of communication between the coun-
cilers and the king, who was all in all. In the reign of Elizabeth, Cecil as secretary stands out as the principal officer of the government, and in 1601 the transition was completed when, for the first time, the title of "our principal secretary

¹ See the great case of Cawdrey, with the heading *De jure regis ecclesiastico*, 5 Rep. I., 1. iii. xv., ed. of 1826.

² 12 Rep. 19, iii. 217; 12 Rep. 26, vi. 227.

³ Roper's Case, 12 Rep. 47, vi. 258; Chamley's Case, 12 Rep. 82, vi. 309; Fuller's Case, 12 Rep., p. 750.

⁴ 16 Chas. I., c. 11, 1640 A.D. See its Act Books, lately printed by Master of the Rolls (in the *Calendar of State Papers*, Domestic Series, 1633-1640), during the last seven years of its existence.

⁵ See Burnet, *History of Reformation*, i. 448.

of estate"¹ was given to his son. When the press, as an instrument for the expression of public opinion, came into prominence during the reign of Henry VIII., the council, sitting as a law court in the "Starred Chamber," was quick to assume over it a control which soon ripened into a repressive system.² At the instigation of Whitgift the press was subjected in 1585 to a regular censorship by ordinances of the star chamber, which undertook its complete regulation in order to prevent the "enormities and abuses of disorderly persons professing the art of printing and selling books."³ As an administrative body the council exercised a multitude of functions, the chief of which related to the management of the finances, the regulation of commerce, including the intercourse with foreign merchants, the supervision of the church, the preservation of the peace, as well as to all contested matters involved in the administration of the colonies. Such was the scope of the Tudor system of government by councils as developed before the close of the reign of Elizabeth. As stated heretofore, without any change whatever in the outward form of the constitution, the center of gravity of the state shifted from the Parliament to the council, as the result of the collapse of the estate system at the close of the civil war. The time had now come for the beginning of a counter revolution through which normal conditions were to be reestablished and the estate system revived by the new conception of political and religious liberty born of the

Robert Cecil "principal secretary of estate."

Censorship of the press.

As an administrative body.

Center of gravity shifted from Parliament to council.

New conception of liberty born of Renaissance and Reformation.

¹ "It needed but one step more for them to pass from mere secretaries into Secretaries of State." Dicey, p. 84. As to the origin of that office, see Judgment of Camden, C.J., in *Entick v. Carrington*, 19 St. Tr. 1030 (case as to general warrants); Nicholas, vi. 117 sq.

² The censorship of the press was first assumed in England, as in the rest of Europe, by the church, which suffered nothing to be published without the *imprimatur* of the licenser. After the Reformation that high function passed from church to state, and was exercised as a royal prerogative through the star chamber.

³ Strype, *Whitgift*, p. 222, and Appendix, 94. For the order made by the star chamber in July, 1637, for the better regulation of the press, see Rushworth, vol. iii., Appendix, 306.

Renaissance and the Reformation. Of the broader and deeper stream of philosophical skepticism, of historical research into the entire past of man which the English Renaissance set in motion, the English Reformation finally became the channel into which, through the greater intensity of the religious impulse, the force of the larger movement was narrowed and concentrated. In that way the ever widening and progressive middle class that dominated the House of Commons when Elizabeth's reign began were imbued with a new spirit of liberty which impelled each sovereign Christian man, armed with the inalienable right of private judgment, to challenge all claims upon his civil and political obedience, whenever such claims were rejected by the supreme oracle supposed to be enthroned in each individual Christian conscience. As early as the reign of Edward VI. the coming change began to be felt through the disappearance of that slavish spirit of obedience which had characterized the Parliaments of Henry VIII. To overcome the opposition to its policy that thus arose out of the reviving spirit of independence, the crown was driven to adopt a system for the "management" of the House of Commons that consisted not only of its packing with royal nominees through a direct interference with elections,¹ but also of the creation of new boroughs, generally small towns or hamlets of no importance, whose constituencies the crown could dominate. In that way under Edward VI. were created or restored twenty-two boroughs;² under Mary, fourteen; while Elizabeth in the same way increased the number of the house

Entered
into middle
classes.

Change
began under
Edward VI.

¹ See first draft of a circular in British Museum, Lansdowne MSS., p. 3; letter to a candidate, Sir P. Hoby, Harleian MSS., p. 523; Froude, *History of England*, v. 125, 126; Strype, ii. 394. When Froude refers to this as the first attempt to make a nomination Parliament, he forgets that later on (v. 432) he admits that the circulars sent out by Mary to influence the elections for the Parliament that met in November, 1554, "were copied from a form which had been in use under Henry VII."

² While some of these were places of note, at least half of the number, including seven in Cornwall, were of no kind of importance.

by the addition of sixty-two members. And yet, in spite of all such expedients, the Puritan opposition to the Tudor system, that grew stronger and stronger as Elizabeth's reign advanced, not only reasserted successfully many vitally important parliamentary privileges, but also maintained to a marked extent the right of the house to deal with the three great questions touching the succession, the church, and the regulation of trade, claimed by the Tudor sovereigns as within the exclusive province of the king in council.¹ The result of the famous attack made in 1601 upon the monopolies was a message from Elizabeth to the house, in which she promised that as to such patents as were "grievous to her subjects, some should be presently repealed, some superseded, and none put in execution, but such as should first have a trial, according to the law, for the good of the people."² Thus the conciliar system lost the first battle in that prolonged struggle through which was finally reestablished the all-important constitutional principle that the supreme powers of the state are vested not in the king in council, but in the king in Parliament.

Powers of
Parliament
revived.

Monopolies.

Beginning
of the
conflict.

17. Robert Cecil, who succeeded his father as Elizabeth's chief counselor, had secretly pledged himself to James in obedience to the popular will,³ and within a few hours after the queen's death the council proclaimed his succession in the midst of a general approval that coolly ignored not only the Suffolk claim, but a dozen more⁴ of a less plausible character. To the Stuarts the conciliar system of the Tudors passed unimpaired just at the moment when that system

The Stuarts
and the
Puritan
Revolution
of 1640.

Conciliar
system
survived
unimpaired.

¹ For details and authorities, see Taylor, *The Origin and Growth of the English Constitution*, ii. 203 sq.

² For the queen's reply to an address of thanks from the house, see D'Ewes, ii. 644, 654; Townshend, pp. 224, 230, 248; *Parliamentary History*, iv. 480.

³ See Bruce, *Correspondence of James VI. with Sir R. Cecil* and others.

⁴ It is said that as many as fourteen claimants existed. See Deolman (Persons), *Conference on the Succession*. The bulk of such claimants derived their rights from sovereigns who reigned prior to the accession of the House of Tudor, such, for instance, as Isabella, the eldest daughter of Philip II.

was becoming unequal to the task of governing a nation which had already entered upon a career of marvelous development. James and Charles, so far from accepting the mission of reform thus naturally arising out of changed conditions, not only continued the system of government by councils which the Tudors had bequeathed to them, but attempted to intensify its absolutism both in theory and practice. What the constitution of the council was in the days of Elizabeth it remained down to the meeting of the Long Parliament, and during that period its powers were stretched to a greater extent than had ever been known before. Between the parliamentary system, animated by the new spirit of liberty that had entered into the commons, and the system of government by councils, animated by the new spirit of absolutism derived from James, a conflict was inevitable. That conflict was a long and bitter one. Not until after the completion of two revolutions was the English nation able finally to subject the conciliar system, as organized by the Tudors and enforced by the Stuarts, to the Parliamentary system as it exists in modern times. In James's first Parliament, which met in March, 1604, after his speech rebuking both Puritans and Catholics, the commons, in an angry mood, asserted their exclusive right to try contested elections, in the cases of Goodwin and Fortescue,¹ and vindicated the freedom of members from arrest in the case of Shirley.² Having thus maintained its privileges, the house addressed itself to the consideration of purveyance and wardship, with a view to their abolition, and to the projected union of England and Scotland.³ Shortly after the proroga-

Conflict
with parlia-
mentary
system.

Parliamen-
tary privi-
leges as-
serted.

¹ Taylor, *The Origin and Growth of the English Constitution*, i. 530 sq.

² *Commons' Journal*, *passim*, from March 22 to May 22, i. 149-222. The great case of Ferrers occurred in 1542 and rests upon the authority of Holinshead (i. 824), and not upon parliamentary records. See May, *Parliamentary Practice*, p. 132.

³ The king said that consummation would enable him to leave at his death "one worship of God, one kingdom entirely governed, one uniformity of law." *Commons' Journal*, i. 171.

tion James assumed the title of King of Great Britain, to which Parliament had refused its assent, and proceeded to sharpen the persecution of the Puritan clergy¹ by demanding of them the more rigid conformity prescribed by the canons of 1604 adopted at the instigation of Bancroft, now promoted to the vacant see of Canterbury. Sharper persecution of the Catholics resulted in the Gunpowder Plot, and the adjournment of the second session of Parliament, in which occurred the conflict between the houses themselves,² out of which grew the rule that a bill cannot be twice proposed in the same session. Then it was that the house demanded in a petition of grievances³ that neither the royal impost on currants, nor that laid upon tobacco by James, should be levied, because no such duties could be legally demanded without parliamentary sanction. When Bate put that contention to the test in the exchequer chamber⁴ there was an unanimous judgment against him, even Coke admitting that the crown had the right in that particular case.⁵ After a failure in the third session to settle the famous controversy as to the nationality of the post-nati, — as those were called who were born in Scotland after the king's accession, — the question of law passed to the courts, where, after argument before the chancellor and the twelve judges in the exchequer chamber, it was held by all, except two, that Colvill (or Calvin) was no alien; that allegiance is the obedience due to the sovereign; and persons born in the allegiance of the king are his natural subjects, regardless of locality. As allegiance was due by both kingdoms to one sovereign, it was held for that reason

Persecution
of Puritans
and Catho-
lics.

Gun-
powder
Plot.

Bate's case.

The
post-nati.

¹ See Wilkins, *Concilia*, iv. 408, 409.

² The lords peremptorily rejected a bill sent up to them by the commons shortly after they had refused their assent to a previous bill on the same subject. *Parliamentary History Journals*, pp. 274, 278, etc.

³ For the text, see Petyt's *Jus Parliamentarium*. Cf. *Parliamentary Debate* in 1610, p. 123.

⁴ Michaelmas Term, 4 James I.; *State Trials*, ii. 404.

⁵ Rep. xii., p. 33.

that internaturalization followed, although each kingdom had its own Parliament and its own laws.¹

The
"Great
Contract."

Refusal to
redress ec-
clesiastical
grievances.

Judges
asked to
define
ordaining
power.

To the fourth session,² which began in February, 1610, Cecil, in the hope of closing the ever widening breach between king and Parliament, submitted a proposal called the "Great Contract," that embodied an offer in general terms to redress all just grievances, provided the house consent to grant in return a sum sufficient to pay the king's debts, and to provide a permanent support of £200,000 a year. A compromise might have been reached, and "just grievances" defined, had it not been for the king's refusal to concede the demands of the commons as to ecclesiastical grievances. To the requests that the deprived ministers should be allowed to preach upon certain conditions, that the old grievances of pluralities and non-residence should be removed, that the conflict of jurisdiction that had arisen out of the efforts made by the court of king's bench to limit the powers of the High Commission by writs of prohibitions should be settled against the latter by restraining statutes, — the house could obtain no satisfactory responses whatever.³ Under such circumstances Parliament was prorogued on the 23d of July. Two months later the king summoned Coke, the chief justice of the king's bench, to appear before the council, where he was asked, first, whether the king could by proclamation prohibit the building of new houses in London in order to check the overgrowth of that city; second, whether he could in the same way forbid the manufacture of starch from wheat, in order to prevent the diminution of the supply for purposes of food. After conference with three of his brethren, the opinion was ex-

¹ Calvin's case, *State Trials*, ii. 559, 7 Jac. I. 1608. See also notes of the judgments in *State Papers*, Dom. xxx. 40, and xxxiv. 10. Cf. Denman, *Broom's Constitutional Law*, 1885, pp. 4-59.

² For the proceedings of this session, see *Parliamentary Debates in 1610*, pp. 126-145.

³ Such was the nature of the king's answer read in the lords at the prorogation, in answer to the memorial there presented on the 21st.

pressed "that while a proclamation cannot make a law, it can add force to a law already made; that (to use the words of judges living in the reign of Mary) 'the king may make a proclamation *quod terrorum populi*, to put them in fear of his displeasure, but not to impose any fine, forfeiture, or imprisonment; for no proclamation can make a new law, but only confirm and ratify an ancient one.'"¹ In the fifth and last session, after another fruitless effort to agree upon the terms of the "Great Contract," James, angered by a state of things in which the commons, while denouncing his Scotch favorites, withheld all supply, dissolved Parliament on February 9, 1611, after an existence of nearly seven years. As the members returned to their homes, the ominous news was carried to every borough and to every shire that the monarchy had broken with the great council of the realm.

Dissolution
of February
9, 1611.

James's second Parliament, which met in April, 1614, at once emphasized the fact that it had inherited the spirit of its predecessor by rejecting as inadequate the unimportant concessions offered in the king's speech, and by announcing that no supply could be granted until a settlement should first be made of the open questions involved in the impositions, the ecclesiastical grievances, and in the monopolies. After the lords had declined a conference² upon the first subject, the judges refused at their request to give an opinion upon the legal questions involved in it extra judicially.³ After dealing with the question of privilege involved in Bishop Neile's case,⁴ the houses were dissolved, after a session of a little more than two months, within which time not a single bill received the royal assent, a circumstance out of which arose the nickname of "The Addled Parliament."⁵ Exas-

"The Ad-
dled Parlia-
ment."

Subject of
impositions
revived.

¹ That famous judgment was delivered by Coke and three other judges (12 Rep. 74). It was brought about by the remonstrances of the commons upon those subjects.

² *Commons' Journal*, ii. 707, 708; Petyt, *Jus Parliamentarium*, p. 340.

³ *Lords' Journal*, ii. 706.

⁴ *Ibid.* ii. 709, 713.

⁵ *Court and Times*, i. 320, 323.

Revival of
all forms of
royal taxation.

Benevo-
lence
resisted
by Oliver
St. John.

Prosecution
of Peacham.

Coke's
courageous
responses.

perated by another failure to obtain supplies, the king now resolved to live without parliaments, a resolve in which he persevered for nearly seven years. During that interval every resource of the conciliar system was employed to raise by means of the prerogative alone sums sufficient to supply the ever increasing wants of the crown, and to strike down by means of its despotic power every individual who dared to oppose the royal will. Thus were revived all of those illegitimate forms of taxation branded as unlawful by the parliaments of the fourteenth and fifteenth centuries. When James appealed for a general and voluntary contribution, Oliver St. John not only refused to subscribe, but wrote a letter in which he denounced the benevolence as contrary to the Great Charter, the act of Richard III., and the king's coronation oath. During his prosecution in the star chamber, resulting in a great fine and imprisonment,¹ Attorney-General Bacon maintained that the benevolence in question was really a free gift, while Coke so far agreed with him as to take back his former opinion against the illegality of benevolences demanded by letters under the great seal.² When Peacham, the first to be convicted of libel in the High Commission, was threatened with a prosecution for treason, while three of the puisne judges permitted themselves to be consulted separately on the law point involved, Chief Justice Coke resisted because "such particular and auricular taking of opinions is not according to the custom of the realm."³ Although the tenure of the judges rested on the pleasure of the sovereign, no one of them had been dismissed for political reasons since the accession of Elizabeth.⁴ When in the "Case of Commendams" Coke was asked whether in a like

¹ *State Trials*, ii. 889.

² Bacon, *Letters and Life*, v. 136. To his last opinion Coke adhered in his reports. 12 Rep. 119.

³ Bacon to the king, January 27, *Letters and Life*, v. 100.

⁴ Gardiner, *History of England*, ii. 8. As to the case of Chief Baron Manwood in 1572, see Foss, *Judges*, v. 321.

case in future he would consult with the king before rendering judgment, in the event his majesty should consider himself interested, nothing more could be drawn from him than the statement that when such a case should arise, he would do what was fitting for a judge to do.¹ For that declaration, Coke, after suspension from office and censure by the council, was dismissed from the chief justiceship in November, 1616.² Bacon, who had attached himself to Buckingham, was appointed lord chancellor in 1618.³

Dismissed
as chief
justice.

When James's third Parliament met in January, 1621, there had not been a parliamentary impeachment since that of Lord Stanley in 1459, a period of one hundred and sixty-two years.⁴ A new beginning was now made in the proceedings against Mitchell⁵ and Mompesson for fraud and oppression, and against Lord Chancellor Bacon for judicial corruption.⁶ When questions of privilege arose out of the imprisonments of Coke and Sandys, James made the alarming declaration that "we think ourselves very free and able to punish any man's misdemeanors in parliament, as well during their sittings as after; which we mean not to spare hereafter, upon any occasion of any man's insolent behaviour there shall be ministered into us."⁷ He then attempted to abridge the right of deliberation by directing an angry letter to the speaker, in which, after asserting that the house had trenched upon his "prerogative royal" by debating "publicly in matters far beyond their reach or capacity," he forbade the members to meddle "with mysteries of state," in which he specially in-

Impeach-
ment
revived.

Questions
of privilege.

Right of
delibera-
tion.

¹ Carte, iv. 35. See also, as to the reply of the judges collectively, *State Papers*, lxxxvii. 44, ii.

² Bacon, *Letters and Life*, vi. 94.

³ A place in the peerage as Lord Verulam soon followed.

⁴ Cf. Stephen, *History of the Criminal Law*, i. 158. Since 1621 fifty-four impeachments have taken place, the last being that of Lord Melville in 1805.

⁵ For the sentence against him, see *Lords' Journals*, iii. 89, 95, 108. Mompesson escaped.

⁶ *Commons' Journals*, i. 560; *Lords' Journals*, iii. 98.

⁷ *Parliamentary History*, v. 492.

Protest of
December
18, 1621.

Impeach-
ment of
Middlesex.

An act regu-
lating
monopolies.

Charles and
Bucking-
ham.

cluded the "match with the daughter of Spain" and "the honour of the king."¹ When the house protested against the attempt "to abridge us of the ancient liberty of Parliament for freedom of speech," James declared its privileges to be a matter of favor and not of right.² Against that pernicious doctrine the commons entered upon their journal the memorable protest of December 18, which a few days later the king, in the presence of the council and the judges, tore out with his own hands.³ In James's fourth Parliament, which met in February, 1624, nothing of constitutional importance occurred except the impeachment of Middlesex, in which it was settled that the accused might be assisted by counsel and should also be furnished with copies of the depositions for and against him.⁴ During a period of fourteen years no new statute had come into existence; and among those now passed the most important was a declaratory act regulating monopolies (21 Jac. I., c. 3) which, after excepting some of the principal ones, declared all others utterly void as contrary to the ancient and fundamental laws of the realm. In October, James prorogued his last Parliament,⁵ and on March 27, 1625, he died.

The result of James's "Kincraft" was not only to break down by the creation of court favorites the influence of the trained administrators, who even in the Tudor time had stood as a constitutional check upon the royal prerogative, but also to infuse into a system already too despotic the exaggerated ideas of absolutism embodied in his theory of the divine right of kings. In that extreme and artificial school both Buckingham and Charles were trained, and from the time the actual direction of affairs passed into their hands they were united by a singleness of purpose that had

¹ The king to the speaker, December 3, *Proceedings and Debates*, ii. 277.

² King to Calvert, December 16, *Proceedings and Debates*, ii. 339.

³ *Parliamentary History*, i. 1362.   ⁴ *Lords' Journal*, pp. 307-383, 418.

⁵ For the proclamation, see *Foedera*, xvii. 625.

for its aim the extension of the political system in which they had been reared. From Charles's accession Laud became his ecclesiastical guide and counselor; and the distrust of the young king, which thus arose out of his alliance with those whom the Puritans regarded as papists at heart, was greatly heightened by his union with the French princess, Henrietta Maria.¹ To all these adverse circumstances that predestined Charles to continue the conflict with the popular party must be added the dogged obstinacy of his natural temper, upon which neither arguments nor current events seemed to have any influence whatever.² Instead of the power to yield honestly at the critical moment, after the manner of the Tudor princes, Charles possessed only the power to dissemble, a fatal defect of which at the beginning of his reign the nation seems to have been profoundly ignorant. In Charles's first Parliament, which met in June, 1625, occurred a series of angry debates in which the Puritans reproached the king for his failure to enforce the penal laws against the Catholics, while the court faction assailed the popular party in the house for their bad faith in refusing to grant supplies for the maintenance of a war undertaken at their express invitation. The real reason preventing a settlement of the financial question was distrust of Buckingham, to prevent whose impeachment Parliament was dissolved on August 12. Under such circumstances the customs revenue Parliament had failed to grant was levied by royal warrant declaring that it "was now a principal part of the revenue of the crown, and was of necessity to be continued for the support thereof";³ and to provide present means for sending out the fleet the council also authorized the issue of privy seals to raise what was in effect

Laud as
ecclesiastical guide.

The king's
obstinacy.

Recriminations in
first Parliament.

Customs
levied by
royal
warrant.

¹ As to the concessions in favor of English Catholics insisted upon by Richelieu, see Carlisle and Kensington to Conway, August 7, 1624, *State Papers*, France.

² Of himself he once said, "I cannot defend a bad nor yield in a good cause." Laud, *Diary*, February 1, 1623.

³ *Foedera*, xviii. 737, xx. 118; Dowell, *History of Taxation*, i. 192.

Ministerial
responsi-
bility.

Bucking-
ham im-
peached.

Eliot and
Digges im-
prisoned.

Use of the
money
power.

a forced loan. In the second Parliament, which began in February, 1626, Sir John Eliot, taking up the subject of ministerial responsibility at the point at which Phelips had left it, essayed the mighty task of substituting for the Tudor theory that ministers are responsible to the crown alone, the more ancient doctrine that they are responsible to the nation in Parliament, a doctrine finally reëstablished in England through the results of two revolutions. To the mind of Eliot, the cause of all the evils from which the country was then suffering was the maladministration of Buckingham; and the whole strength of his nature was concentrated into the effort to bring him to justice through the application of the means so successfully applied to the punishment of Bacon and Middlesex. In May, Buckingham was impeached at the bar of the lords where Eliot, after a prologue from Digges, combated in a great speech, that opened up a new era in English eloquence,¹ the idea that a minister could claim immunity from punishment by pleading obedience to the commands of his sovereign.² Charles's response was the committal of Eliot and Digges to the Tower for offensive words spoken in the course of the impeachment.³ The counter blast from the house was a successful refusal to proceed with business until their members were released. After failure to induce the peers to pronounce judgment against the favorite, the commons attempted to use the money power as a means of forcing Charles to concede ministerial responsibility in a form that involved a direct admission of their supremacy over the crown. The king's reply was an immediate dissolution.

¹ Foster, *Sir J. Eliot*, i. 324-330.

² In speaking of the loan of English ships to serve against the Protestant city of Rochelle, he said, "that if his majesty himself were pleased to have consented, or to have commanded, which I cannot believe, yet this could no way satisfy for the duke, or make any extenuation of the charge." For the earlier history of that doctrine, see Taylor, *The Origin and Growth of the English Constitution*, i. 442, 443, 503.

³ Both houses finally declared they had heard no such words. *Lords' Journal*, pp. 592, 627; *Commons' Journal*, May 12, 13, 15, 17, 19, 20.

On the 15th of June his second Parliament ended its existence. Under such a pressing need for money as had never been felt before, the council made a demand upon the counties for a free gift, which was to be raised by the justices of the peace who were instructed to exhort their counties voluntarily to supply the amount of the four subsidies provided for in the act of Parliament that had failed to pass.¹ To that demand, which struck at the very existence of the parliamentary system, sharp resistance was offered, out of which in 1627 grew the case of the five country gentlemen who, after imprisonment for their resistance, appealed to the court of king's bench for a habeas corpus to test its legality.² At the bar they claimed that they were protected by that clause of the Great Charter which provides that "no freeman shall be imprisoned . . . unless by the lawful judgment of his peers, or by the law of the land." In other words, they claimed that they were entitled to "due process of law," which a commitment of the privy council, even "*by special order of the king*," was not. After the attorney-general, relying mainly upon the famous dictum contained in Anderson's Reports, had argued that such a commitment, although it assigned no cause, was "due process of law," a judgment was rendered by Chief Justice Hyde, refusing bail, but without holding directly that the king could never be required to show cause.³ A new expedient was now put forward, resting on a tradition dating back to the beginning of English taxation in pre-Norman times, the Danegeld assessment of 1008.⁴ In accordance with the practice existing in the time of the Plantagenets,⁵ a part of the fleet that took Cadiz in Elizabeth's reign had been supplied by a levy on the maritime counties, and in June,

Royal
taxation.

Case of the
five knights,
1627.

"Due
process of
law."

Origin of
ship money.

¹ *State Papers*, Dom. xxxi. 30, 31; *Foedera*, xviii. 764.

² The return was that they were held under warrant from the privy council by *special command of the king*.

³ *State Trials*, iii. 1.

⁴ See above, p. 236.

⁵ Extracts from the public records, *State Papers*, Dom. cclxxvi. 65.

1626, Charles had ventured to command such counties to join the port towns in sending out a fleet.¹ In February, 1628, when all other means had failed, Charles conceived the idea of levying ship money as such upon all counties, and letters were accordingly issued, commanding that the sum assessed upon each shire should be paid into the exchequer by the first of March.² In view, however, of the opposition which the unheard-of demand at once provoked, the king promptly revoked the order, and thus suspended the new device until a later day.³

Sir Thomas
Wentworth,
1628.

Such was the prelude to the calling of Charles's third Parliament, which met in March, 1628. Side by side with Eliot, Coke, and Phelips now stood Sir Thomas Wentworth, who did yeoman's service in the popular cause in a great oration in which, after reviewing all the questions in controversy, except those involving the subject of religion, he demanded that there should be no more forced loans, no more illegal imprisonments, no more compulsory employments abroad, no billeting of soldiers without the assent of the householder, thus outlining the substance of the great statute, afterward known as the Petition of Right, that derived its form from Coke.⁴ When Charles undertook to promise in general terms, Coke proposed on May 6 a petition of right, whereby the king could "speak by record and in particulars, and not in general terms."⁵ The famous document then drawn up by a subcommittee, and which is usually compared with the Great Charter because it attempted to curb the power of the

Petition
of Right.

¹ For a list of the ports called upon to furnish ships, see *State Papers*, Dom. xxx. 81, June. As to the ships required from Exeter, see Hamilton, *Quarter Sessions*, p. 119.

² For a list of the sums levied upon the counties, amounting for all England to £173,000, see *State Papers*, Dom. xcii. 88, 93.

³ *Court and Times*, i. 322, 324.

⁴ "If Coke was finally to give to the petition its form, Wentworth was the originator of its substance." Gardiner, vi. 237.

⁵ Coke said, "not that I distrust the king, but that I cannot take his trust, save in a parliamentary way." *Parliamentary History*, viii. 195.

Tudor monarchy inherited by the Stuarts, as the earlier document had attempted to curb the Angevin monarchy as it existed in the days of John, forbade all forms of illegal taxation, arbitrary imprisonments without due process of law, billeting of soldiers and mariners, and proceedings under martial law. When Parliament reassembled in January, 1629, the case of Rolle,¹ a member whose goods had been seized for his refusal to pay tonnage and poundage, drew from the king the declaration that he did not intend to levy the customs by his "hereditary privilege."² The house's cold response to that concession revealed the fact that it was now intent upon the redress of the religious grievance involved in the departure that had taken place from the Calvinistic theology, dominant in the national church almost from the beginning of the Reformation, in favor of what was denounced as popery and Armenianism. To arrest discussion and prevent the adoption of resolutions on that subject, the king on February 25 sent a command to the house to adjourn until the 2d of March, to the end that "a better and more right understanding might be begotten between him and them."³ To the first order the house submitted; but when on the 2d of March the speaker, Sir John Finch, declared that it was the king's pleasure that they should adjourn until the 10th, Eliot resolved to resist the power of the crown to force an adjournment. While the speaker was held forcibly in the chair, Eliot's resolutions upon taxation and religion were offered by Holles, who himself put the question.⁴ After their adoption the commons of their own motion adjourned themselves until the 10th. After justifying the act, Charles then

Rolle's case.

The religious grievance.

Power of king to force adjournment resisted.

¹ *Attorney-General v. Rolle*, Orders and Decrees in the Exchequer, November 13, 27, 4 Charles I., fol. 254, 262.

² See the extract printed in Lingard, viii. 346.

³ *Parliamentary History*, ii. 502.

⁴ For the events of that day, see *Journals* of both houses; Rushworth, i. 655-672; Whitelock, pp. 12, 13; Nicholas's *Notes*; *State Papers*, Dom. cxxxviii. 6, 7. For the best restatement, see Gardiner, vii. 67-76.

dissolved the Parliament in which Eliot ¹ had made his last, and Oliver Cromwell his first, speech, and whose successor was not to be called until after the lapse of eleven years of personal rule.

Ship writs
to inland
counties.

Hampden.

Judgment
against him.

During that period it was, when government was carried on by the council only with the aid of servile judges,² that the king, in June, 1635, announced his intention to extend ship writs to inland counties, as "an everlasting supply of all occasions."³ When in the next year another set of writs were issued the constitution found a resolute defender in John Hampden, a cousin of Oliver Cromwell, who resolved that the great question of ship money, already sustained by the answers of the judges,⁴ should be argued in open court by famous advocates, who could thus be heard by the nation as a whole. Of the five judges against seven ⁵ who sided with Hampden, now a national leader, three based their judgments on purely technical grounds, leaving only two who held with him on the merits.⁶ During this eleven years of personal rule, during which Charles was driving the conciliar system on to its doom, he was zealously supported by two able ministers, who stood firmly by his side until first one and then the other was stricken down by "that two-handed engine at the door, ready to smite once, and smite no more."⁷ When in February, 1637, the judges for the second

¹ Immediately after adjournment Eliot and eight of his associates were committed to the Tower or to other prisons. 6 *Parliamentary History*, viii. 333.

² Bacon says in one of his essays that judges should "be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."

³ Clarendon, *History of the Rebellion*, i. 68.

⁴ February, 1637. *State Papers*, Dom. cccxvi. 11, 14; Rushworth, ii. 352.

⁵ These judgments were delivered at intervals during the year 1638. R. v. Hampden (case of ship money), 13 Car. I., *State Trials*, iii. 825-1316.

⁶ Crooke, speaking in his behalf, said: "This writ is illegal, not being by authority of Parliament. It is against the common law, as appears by the fact that it is the first since the Conquest sent to an inland town to prepare a ship." See Denman, *Broom's Constitutional Law*, pp. 338-355; Thomas, *Leading Cases in Constitutional Law*, pp. 21, 22.

⁷ Milton, *Lycidas*.

time upheld the legality of ship money, Wentworth, who for a time was "with the opposition, but not of it,"¹ wrote: "This decision of the judges will therefore make the king absolute at home and formidable abroad. Let him only abstain from war for a few years, that he may habituate his subjects to the payments of this tax, and in the end he will find himself more powerful and respected than any of his predecessors."² The attempt of Laud, who was made pri-
Laud.
 mate in 1633, to force uniformity upon the Scotch Kirk finally brought Charles to the verge of war with his Scottish kingdom, a condition relieved by the treaty of Berwick signed June 18, 1639. Wentworth, who was made earl of Strafford
Strafford.
 in January, 1640, now became more emphatically than ever before Charles's chief guide and counselor. A born administrator, he was scornful of all private ends in the desperate struggle upon which he entered to build up in England, as Richelieu was building up in France, a system of despotism whose organization was to be "thorough." Pressing need of money to carry on the impending war with Scotland forced Strafford to advise the calling of the Short Parliament, which met April 13, 1640. When a demand was made for subsidies to destroy the allies who were fighting the battle of English freedom across the border, the house, led by Pym
Pym and
Hampden.
 and Hampden, resolved to take up first the question of grievances: "Till the liberties of the house and kingdom were cleared, they knew not whether they had anything to give or no."³ Before making a grant the house was determined that redress should be given for the breach of privilege that had arisen out of the prosecution of Eliot, Holles, and Valentine, and for the unconstitutional exaction of ship money and the impositions.⁴ At that point Charles appealed to the lords,

¹ Gardiner, vi. 335.

² *Strafford Papers*, ii. 61.

³ Harleian MSS., 3, 931, fol. 47 b.

⁴ *Parliamentary or Constitutional History*, viii. 441.

Exclusive
right of
house to
originate
money bills.

Short
Parliament
dissolved,
May, 1640.

Death
grapple
between
conciliar
and parlia-
mentary
systems.

who declared by a great majority¹ that in their judgment "supply should have precedence, and be resolved upon before any other matter whatsoever," a conclusion which in conference was expressed to the commons, who promptly resented the suggestion of the lords as a high breach of their exclusive privilege to originate money bills. The lords, however, maintained their position by a diminished majority,² while the king demanded an immediate grant of twelve subsidies, in exchange for which he proposed to give up ship money. So soon as it was known that the houses would not pay unconditionally so great a sum for the redress of a grievance that should never have existed,³ Parliament was abruptly dissolved on May 5, after a session of three weeks, during which time it sternly expressed by its refusal to do anything the breadth and depth of the national displeasure. "So great a defection in the kingdom," wrote Northumberland, "had not been known in the memory of man."

The time had now come for the death grapple between the conciliar system, to which the genius of Strafford had given a fresh inspiration, and the parliamentary system, destined to enter upon a new career under the leadership of Pym, who was the first to put in practice the constitutional principle, — the basis of the English constitution in its modern form, — which maintains not only that the supreme powers of the state are vested in Parliament as against the Crown, but that as between the houses themselves the ultimate sovereignty resides in the popular branch of the legislature. Fully conscious of the fact that these mighty issues were bound up in the impending crisis, Pym rode with

¹ Sixty-one out of a house of eighty-six voted for the king. *State Papers*, Dom. cccli. 39.

² Admitting, however, that "the bill of subsidies ought to have its inception in your house; and that when it comes up to their lordships, and is by them agreed to, it must be returned back to you, be, by your Speaker, presented."

³ Cf. Clarendon, *History of the Rebellion*, i. 136.

Hampden through the counties upon the eve of the elections, in order to urge the constituencies to return men of the right temper to represent them in that famous assembly which met on the 3d of November, 1640, and which was destined to be known for all time as the Long Parliament. The response to the joint appeal was such a manifestation of popular support as had not been seen since the days of Simon of Montfort. The leadership of the great majority thus gathered at St. Stephen's naturally passed to Pym, and, according to his conception, the duty of the popular party in the house was to hew away by purely constitutional means the abnormal powers the conciliar system had taken on during the Tudor period, and which both James and Charles had augmented, in order to restore the parliamentary system to the position of legitimate influence it had enjoyed in the days of the Lancastrian kings. The means finally employed for that end consisted, first, of the removal and punishment of the great ministers by whom the conciliar system had been perverted; second, of the correction of the more recent abuses brought about by them; third, of such diminution of the powers of the council as to render it incapable of serious harm for the future. Under these three heads may be grouped all of the more important acts of the Long Parliament. The leadership to which Pym was assigned by the popular party, and which put at his back not only the House of Commons but a Scottish army on English soil, involved him at once in a duel to the death with Strafford, who was supported by all the resources of the conciliar system and by the army of the king. While the two gladiators thus equipped glared at each other for a moment across the arena, Strafford forced Pym's hand by advising Charles to seize the popular leaders upon a charge of treasonable relations with the Scots.¹ Only a timely betrayal of the secret enabled Pym to parry the blow

Long Parliament,
November,
1640.

Leadership
of Pym.

His duel to
the death
with Strafford.

¹ Rushworth, *Strafford's Trial*, p. 2; Laud, *Works*, iii. 295.

His im-
peachment
and

attainder.

Trial of
Laud.

His
attainder.

Judgment
against
Hampden
annulled.

by impeaching Strafford so hurriedly at the bar of the lords, on the 11th of November, that he was forced to promise that the house would send up the grounds of accusation at a later day.¹ In the trial that began March 22, 1641, the turning point was an unsuccessful attempt to prove that Strafford proposed at the council board to bring over the Irish army to subdue England.² A failure in the proof led no doubt to an abandonment of the impeachment in order that resort might be had to the surer and swifter means of a bill of attainder, brought in on the 10th of April and approved on the 10th of May.³ When the trial of Laud, impeached in 1640, began in March, 1644, his counsel contended that upon the facts adduced he was not guilty of treason as a matter of law under the statute of Edward III.⁴ The impossibility of answering that argument drove the commons to abandon the impeachment, and to pass the bill of attainder under which he was executed in 1645.⁵ Two days after the house ordered the impeachment that deprived Strafford of its liberty, it commanded the release of Prynne, Bastwick, Burton, Leighton, and Lilburne, victims of the cruel tyranny of the star chamber.⁶ Turning then to the redress of the gigantic evil known as ship money, it passed an act which, after declaring void the late proceedings on that subject, and vacating all records and process concerning the same, specially annulled the judgment rendered in the exchequer chamber against Hampden as contrary to the liberty of the subject as defined in the laws of the realm in general, and in the Petition of Right

¹ *Commons' Journal*, ii. 26; Clarendon, *History of the Rebellion*, i. 243.

² For Strafford's objections to the sufficiency of Vane's testimony, see Gardiner, *History of England*, ix. 319, 320.

³ *Strafford Letters*, ii. 432. Charles said as he signed the bill, "My lord of Strafford's condition is better than mine."

⁴ Laud, *Works*, vi. 416.

⁵ The bill encountered legal difficulties in the lords which were referred to the judges, who declined to give an opinion. *Lords' Journal*, December 17, 1644.

⁶ Clarendon, *History of the Rebellion*, i. 202.

in particular.¹ An Annual Parliament Bill, reciting the old statutes of Edward III. guaranteeing the right,² was read a second time in the commons in December, 1640, at Cromwell's motion; but it was shortly afterward transformed into a Triennial Bill,³ the essence of which was that if in every three years a Parliament was not duly summoned by the crown, writs should be issued by certain functionaries independently of it. In another act it was provided that the present Parliament was not to be dissolved without its own consent. By an "Act for the regulating of the privy council, and for taking away the court commonly called the star chamber,"⁴ was swept away at a blow all of that abnormal judicial authority which during a century and a half had been exercised by the council to the detriment of the ordinary tribunals; and on the day Charles signed that bill he assented to another⁵ repealing that branch of the statute of 1 Elizabeth, c. 1, under which, as the repealing act recites, "the said commissioners have to the great and insufferable wrong and oppression of the king's subjects, used to fine and imprison them and to exercise other authority not belonging to ecclesiastical jurisdiction." The statutes enacted during the ten months preceding the recess embody the permanent work of the Long Parliament, which, with the exception of the compulsory clauses of the Triennial Act, was accepted at the Restoration as a part of the permanent constitution of the country, while everything enacted after the recess was at the same time rejected as temporary and worthless. From the reassembling of Parliament, after the recess that ended on the 20th of October,

Triennial
Bill.

Star
chamber
and High
Commis-
sions abol-
ished.

Permanent
work of
Long
Parliament.

¹ 16 Car. I., c. 14. Approved August 8, 1641, along with bill limiting the boundaries of the forests. Five of the judges who had pronounced in favor of ship money were impeached. Stephen, *History of the Criminal Law*, i. 159.

² 4 Edw. III., c. 14; 36 Edw. III., st. i., c. 10.

³ Cf. Gardiner, *History of England*, ix. 253, 282.

⁴ 16 Car. I., c. 10.

⁵ 16 Car. I., c. 11, entitled "A repeal of a branch of a statute *primo Elizabethae*, concerning commissioners, for causes ecclesiastical."

Origin of
parliamentary
parties.

Grand Remonstrance.

Attempt on
the five
members.

1641, can be traced more distinctly than ever before the beginning of the two parliamentary parties which, after having been known first as Roundheads and Cavaliers, then as Whigs and Tories, still survive under the names so familiar at the present day. The first conflict between the new parties occurred on November 22, when the Grand Remonstrance — a manifesto whose essence was embodied in those parts of it in which the popular leaders formulated (1) their plan of church reform, and (2) the demand already made by Pym in his "additional instruction," for a ministry directly responsible to Parliament — was adopted by a majority of only eleven votes.¹ When the royalists attempted to resist the printing of the Remonstrance the house broke into flame, and some "took their swords in their scabbards out of their belts and held them by their pommels in their hands, setting the lower part on the ground."² When the parliamentary leaders threatened to impeach the queen herself, she nerved Charles to the desperate step that cost him his crown and his life. On the 3d of January, 1642, the attorney-general, under an order signed by the king's own hand, impeached for high treason Lord Kimbolton, together with Pym, Hampden, Holles, Hazlerigg, and Strode, members of the lower house, who were charged generally with an attempt to subvert the fundamental laws and government, and to deprive the king of his royal power.³ When the lords refused to order the arrest of the five members, Charles took the extraordinary step of himself issuing the warrant commanding a sergeant-at-arms to make the arrest. Baffled in that attempt, he set out from Whitehall with the Elector Palatine at his side and a mob of

¹ See Foster, *Grand Remonstrance*, p. 316. As Cromwell left the house he said: "If the Remonstrance had been rejected, I would have sold all I had next morning, and never have seen England any more; and I know there are many other honest men of this same resolution." Clarendon, iv. 52.

² D'Ewes, *Diary*, Harleian MSS., clxii., fol. 180.

³ Rushworth, iv. 471.

Cavaliers at his back, intent upon the execution of his purpose at Westminster.¹ While the royal standard was not raised at Nottingham until the 22d of August, it may be said that "when Charles and his armed attendants passed through the lobby of the House of Commons on the 4th of January, the civil war had substantially begun."²

Civil war
began in
January,
1642.

18. There is no good reason to believe that a single member of the great popular majority which gathered at St. Stephen's upon the meeting of the Long Parliament imagined for a moment that the revolution then set in motion under legal forms would culminate in the execution of the king and in the substitution of a republican system for the ancient constitution. That entirely unforeseen result suddenly arose out of a great religious and political upheaval broken into four distinct stages, each of which was the natural, possibly the inevitable, sequence of the preceding. When Pym, as the leader of the popular party, undertook to settle once and for all the vital principle that the supreme powers of the state are vested in Parliament as against the crown, and that as between the houses themselves the ultimate sovereignty resides in the popular branch of the legislature, he contemplated no more than such a readjustment of the constitutional forces as would fix the center of gravity of the state in the representative chamber. The first stage of the revolution consisted in the efforts made in that direction by the popular party while acting as a whole, and striking as one man against abuses which were permanently removed through the measures adopted during the first ten months of the Long Parliament. The second stage began after the recess, when the triumphant progress of the popular party was checked by a division in its own ranks as to the disposition to be made of the episcopal

Common-
wealth and
Protec-
torate.

Great
upheaval
broken into
four stages.

Reforms
during first
ten months
of Long
Parliament.

¹ For a complete statement, see *Commons' Journal*, January 4; Rushworth, iv. 477; Gardiner, *History of England*, x. 129-141.

² Foster, *Arrest of the Five Members*, pp. 376 sq.

Struggle
ending with
Grand Re-
monstrance.

Triumph of
Presby-
terian over
Episcopal
system.

Triumph of
Independ-
ents over
Presby-
terians.

All Inde-
pendents
combined in
New Model.

office, — one faction contending for its entire abolition, the other for the retention of the bishops with diminished powers and subject to parliamentary jurisdiction. The latter claim, maintained by the old Puritan party within the church, triumphed in the memorable struggle over the Grand Remonstrance, whose adoption was accepted as a settlement of the fact that the establishment, while retaining episcopacy, in a modified form, would tolerate neither the Laudian element within its pale, nor the sectaries who gathered without in separate conventicles. The third stage began when the Root-and-branch party, which insisted upon the entire abolition of the episcopacy, was able to enforce its ideas through a political alliance with the Scots, who demanded, as the price of military aid to the parliamentary cause, the acceptance of the Covenant and the substitution of the Presbyterian for the Episcopal system in the Church of England. That concession, reluctantly made by Pym and his followers as a political necessity, did nothing, however, to advance the cause of religious toleration. The Presbyterian party, which thus came into possession of the state church, refused to relinquish one tittle of its right to embrace the whole nation in its fold, and to dictate to all their faith and form of worship. The fourth and last stage of the revolution began when the whole dissenting body of sectaries resolved to band together for the assertion of congregational independence against the scheme of legal uniformity pressed upon them through the state church by the Presbyterian majority dominant in Parliament. This combined opposition of the sectaries, generally designated as Independents, first assumed a definite and formal shape when all of its various elements were united by Cromwell and Fairfax in that strange army and Parliament in one, known as the New Model, whose corner-stones were social and religious toleration. Into the ranks of that organization entered every shade of dissident opinion, not only religious

but political. There it was that the religious independent was converted into the political independent; there it was that the levelers appeared as an organized republican association ready to substitute for the ancient constitution developed without design a commonwealth of the saints based on abstract principles. As early as October, 1647, the levelers had embodied their new conception of government in the draft of a constitution, entitled "The Agreement of the People,"¹ which proposed, first, that the constituencies should be "more indifferently proportioned according to the number of inhabitants"; second, that the existing Parliament should be dissolved on September 30, 1648; third, that all future Parliaments should be triennial; fourth, that a single elected chamber should be supreme in all things not "expressly or impliedly reserved by the represented to themselves." That prototype of all constitutions, state and federal, as they exist to-day in the United States,² was to draw its authority from a direct acceptance from the people, who reserved to themselves, by express constitutional limitations upon the powers granted, certain rights, among which the agreement pointedly named the absolute right to religious liberty and due process of law. This republican ideal, destined to such a marvelous expansion, which the levelers, under the lead of Liburne, persistently pressed upon the leaders of the army, was finally completed in a modified form by the council of officers on the 15th of January, 1649, and by them presented five days later to the House of Commons, who agreed to consider it as soon as "the necessity of the present weighty and urgent affairs would permit."³ It was clearly understood, however, that with that part of this programme which suggested that

"The Agreement of the People."

Prototype of all American constitutions.

Completed, January 15, 1649.

¹ "An Agreement of the People for a firm and present peace," etc. (E. 412. 21), presented to the council of the army, October 28, 1647, and printed in full in the Appendix to vol. iii. of Gardiner's *History of the Great Civil War*.

² Cf. Bryce, *American Commonwealth*, pt. ii.; Gardiner, iii. 387.

³ *Commons' Journal*, vi. 122.

Rump
retained by
army.

Enactments
of commons
have force
of law.

Rump
cleared the
way for first
republican
constitu-
tion.

Monarchy
and House
of Lords
abolished,
February 7,
1649.

the Rump should yield to another body elected upon more popular principles, its members had no possible sympathy. The army therefore resolved to retain for the moment this fragment of an assembly which it had purged of its Presbyterian elements, as a veil for the power of the sword, and as a link, however weak, with the past. By its voice the sovereignty of the people was proclaimed, and the ancient constitution practically abolished by the resolutions, adopted the 4th of January, 1649, declaring that the enactments of the commons alone should have the force of law, "although the consent and concurrence of the king or house of peers be not had thereto."¹ Two days later the same assembly, unaided by any precedent in the history of nations, created the tribunal under whose judgment the king passed to his doom.

The House of Commons, which at the beginning of the Long Parliament consisted of five hundred and six members, had now dwindled to a mere shadow; at the largest division that took place during the month that followed the king's death only seventy-seven members were present to record their votes.² And yet by the sole authority of this Rump of a Parliament the monarchy was overthrown and the first crude and tentative republican constitution that appeared in its stead was set up. In order to clear the ground for the erection of the new structure, a vote was taken on the 7th of February abolishing the monarchy as "unnecessary, burdensome, and dangerous for the freedom, safety, and public interest of the people of this nation,"³ and at the same time the House of Peers was swept away as "useless and dangerous." On the same day a council of state was voted "to be henceforth the executive power,"⁴ and on the 14th the forty-

¹ *Commons' Journal*, vi. 110, 111.

² *Ibid.* vi. 128, 130, 140, 143, 147; *Parliamentary or Constitutional History*, ix. 12.

³ *Ibid.* vi. 132, 133.

⁴ *Ibid.* vi. 133, 138.

one members of whom it was composed were elected by a separate vote on each name, and the body thus constituted was charged under "the orders of the house," with the direction of the military and naval forces, the collection of the revenue, the preservation of the internal peace through the police power, the supervision of trade, external and internal, the administration of the colonies, and the negotiation of treaties with foreign nations.¹ The theory was that all the powers of the state were vested in the Rump, and that its elected council was a mere agent in the work of administration. All writs now ran in the name of "the keepers of the liberty of England by the authority of Parliament." The judiciary was reorganized, and the house declared by a formal vote that the common law should remain as the rule to be enforced by their judgments.² Not until the 19th of May was the act passed which formally declared the republic to be a "commonwealth and a free state." When the Rump refused to dissolve itself, Cromwell finally dissolved both the Rump and its council by the sword, April 20, 1653.³ After clearing the chamber he took the mace from the table and then closed and locked the doors. Having thus torn away the veil by which the power of the sword had for a time been concealed, the military party, under the direction of Cromwell, proceeded to construct a purely military dictatorship, whose executive organ was a self-appointed council of state composed of eight officers of high rank and four civilians, which, with Cromwell at its head, was intended to be symbolic of Christ and his twelve apostles.⁴ The abortive attempts at

Powers of
council of
state.

Judiciary
reorganized.

Rump dis-
solved,
April, 1653.

Military
dictator-
ship.

¹ *Ibid.* vi. 139, 140. The powers of the admiralty were also vested in the council. Cf. Guizot, *Cromwell*, p. 5; Godwin, *History of the Commonwealth*, iii. 35.

² *Commons' Journal*, vi. 134-136; Gardiner, *Commonwealth and Protectorate*, i. 10. Six of the judges refused to serve without such a declaration.

³ Then it was that Bradshaw, president of the council, declared: "But, Sir, you are mistaken to think that the Parliament is dissolved. No power under heaven can dissolve them but themselves. Therefore take you notice of that." Cf. Whitelock, p. 554; Ludlow, ii. 19, 23; Leicester, *Journal*, p. 139.

⁴ *Cromwell's Letters and Speeches*, ii. 386; *Old Parliamentary History*, xx. 151.

reform made by the constituent assembly set up under this régime so alarmed all classes that Cromwell dissolved it, December 12, 1653.¹ Four days later Cromwell was tendered the office of protector under a new constitution called the "Instrument of Government,"² which vested the supreme executive power in a protector and council, and the supreme legislative power in a protector and a single-chamber Parliament to be assembled triennially. On the 25th of March, 1657, a new scheme of government was adopted vesting the supreme powers in a protector and a two-chamber Parliament. While the new constitution, which Cromwell himself styled "An Act of Government,"³ withheld from him the title of king, it indicated an unmistakable purpose to return to the monarchical system by providing for the creation of an upper house, whose members were to be nominated by the protector with the approval of the popular chamber in the first instance, and afterward of that of the upper house itself. The supreme power was still to remain in the protector, who was authorized to name his successor.

When Cromwell died, September 3, 1658, the fabric of his power passed so safely through the ordeal of his death that the council was able to proclaim the peaceful succession of his son Richard, despite the grave doubt that existed as to the fact of his nomination. A mere verbal statement that he had been designated by his father as his successor a short time before his end⁴ was accepted as sufficient, and to the surprise of all the new protector, who was supported neither by personal merit nor public services, promptly summoned a Parliament, the popular branch of which was constituted

"Instrument of Government,"
1653.

"An Act of Government,"
1657.

Richard Cromwell,
September,
1658.

¹ *Commons' Journal*, vii. 363; Ludlow, *Memoirs*, pp. 199, 200.

² A proclamation was then issued with the ceremonies usual upon the accession of a new monarch. Thurloe, i. 632 sq.; Foster, *Statesmen of the Commonwealth*, v. 223-228.

³ *Letters and Speeches*, iii. 367, 370.

⁴ Thurloe, vii. 372. See also *Ibid.*, pp. 364, 365.

on the old plan, thus reviving the representation of many boroughs disfranchised by the scheme of reform recently employed on several occasions. When a fresh conflict arose between the army and the houses, the latter were dissolved April 22, 1659.¹ The supreme power was then resumed by the military chiefs, who, in the hope of composing the country, upon the verge of anarchy, agreed with the republicans that the protectorate should be set aside in favor of the remnant of the Long Parliament,² which had been expelled from St. Stephen's on the 20th of April, 1653. The new coalition thus formed for the defense of republicanism and civil liberty endured, however, only for a moment. Dissensions at once arose out of the demands made by the army which Parliament regarded as unbearable, and thus began a new conflict that culminated on October 13 in a fresh expulsion of the Rump by the officers, who undertook to secure the public peace, and to prepare a new form of government for submission to a new Parliament. At that point it was that the army finally divided against itself. General Monk, the commander of the Scottish forces, the moment he heard of the expulsion of the members openly appeared as their patron, under the title of "asserter of the ancient laws and liberties of the country." By that pressure the Rump was reinstated in all its former authority before the end of December. Early in January, 1660, Monk crossed the border, and in February he agreed to admit the royalist Presbyterian members who had been excluded from the house in 1648, upon their promise to settle the arrears of the army, to issue writs for a new Parliament to sit at an early day, and to dissolve themselves before that

Houses
dissolved,
April, 1659.

Rump
restored
in May.

Expelled in
October.

General
Monk, Jan-
uary, 1660.
Excluded
members
admitted.

¹ *Ibid.* vii. 555, 557, 662; Burton, *Diary*, iv. 448-463; Whitelock, p. 677.

² From the republican body thus reconstituted were carefully excluded those members at once royalist and Presbyterian, of whom the house had been purged by Colonel Pride on the 6th of December, 1648. "Of those, one hundred and ninety-four were still alive, eighty of whom actually resided in the capital." Lingard, viii. 573.

Long
Parliament
dissolved,
March 16.

Convention
Parliament
met, April
25.

Return of
Charles II.

Restoration
and Revo-
lution of
1688.

Continuity
of develop-
ment as
affected by
revolution-
ary epoch.

time.¹ Under that compact a bill was read for the third time on the 16th of March, dissolving "the Parliament assembled on the 3d of November, 1640," and convening at the same time a new assembly to be composed of lords, knights, citizens, and burgesses, which was to meet on the 25th of April, 1660. At the appointed time the Convention Parliament, so designated by reason of the fact that it was called without the king's writ, met; and after the organization of the lower house with the Presbyterians in the majority, and with the presence in the upper of the greater part of the peerage,² the scheme of restoration was laid bare by the presentation to the two houses of letters directed to them from Breda by the king, who briefly set forth therein the conditions under which he was willing to ascend the throne of his ancestors. Upon the faith of that declaration,³ which was accepted as a royal charter, the houses, after declaring that "the government is, and ought to be, by king, lords, and commons," invited Charles to return and continue his reign, proclaimed as having commenced from the day of his father's execution.⁴

19. Nothing is more remarkable in the history of the English constitution than the persistent continuity of its development, through which all of the changes and innovations demanded by the wants of a great and growing nationality have been gradually brought about without any open break with the past. The nearest approach to an exception to that general rule is to be found in the revolutionary period, beginning with the meeting of the Long Parliament and ending with the Restoration, the period of upheaval during which

¹ *Commons' Journal*, February 11, 13, 15, 17, 21; Price, pp. 768-773.

² The peers who sat in the king's Parliament at Oxford and those whose patents bore date after the beginning of the civil war did not demand admission for the moment.

³ *Lords' Journal*, xi. 7, 10.

⁴ 1660 is described in the Statute Book as the twelfth of the reign.

the social, political, and religious forces that abide in the England of to-day broke the spell of custom and tradition by which the medieval church, the medieval monarchy, and the dying feudalism had so long enthralled the minds of men. True it is that when Puritanism laid down the sword, the republican régime set up in its name gave way to a restoration of the monarchical system, not, however, in the form in which it had been overthrown, but as purified and remodeled by the drastic and enduring legislation enacted during the first ten months of the Long Parliament.¹ And apart from the permanent legal changes thus brought about by positive legislation must also be estimated the ultimate effects of many new ideas then germinated, which, after having been for a time put aside, have ripened at last into some of the most important reforms of modern times. It is thus possible to trace to this period of upheaval, characterized by a freedom of thought never before known, not only the beginnings of the great parties that have ever since dominated the political and religious life of England, but also the germs of religious toleration, of electoral reform, of the cabinet system, of modern taxation, as well as the transition from the ancient to the modern military system. Only the outward forms of the work of Puritanism perished at the moment of apparent overthrow. While Cromwell and his republic passed away, the indomitable spirit of civil and religious liberty that culminated in them has lived on as the advancing and reforming force in English society which expressed itself first in the Revolution of 1688, and finally in that whose outcome was the Reform Bill of 1832. It is, therefore, from this period

Monarchy restored, not in the form in which it was overthrown.

Effect of new ideas germinated during upheaval.

¹ "Whatever had been done so far by the Long Parliament stood the test of time. The overthrow of the special courts, by which the prerogative had been defended under the Tudors and the first two Stuarts, together with the abandonment by the king of all claims to raise taxes without the consent of Parliament, was accepted as the starting point of the restored monarchical constitution in 1660." Gardiner, *History of England*, x. 10.

Beginnings
of the mod-
ern consti-
tution.

Return to
monarchi-
cal system.

Charles's
declaration
from Breda.

Convention
declared
itself to be
"the two
houses of
Parlia-
ment."

of transition, from the old to the new, during which the continuity of England's political life was for a moment suspended, not broken off, that we can trace the beginnings of the constitution in its modern form. When Cromwell at the height of his power attempted through the "Act of Government" to return as far as possible to the forms of the monarchical system, he clearly manifested his belief in the necessity of restoring the ancient constitution as modified and purified in the crucible of revolution. Animated by the same conservative spirit, the Convention Parliament entered upon its work, firmly resolved to restore "government . . . by king, lords, and commons," subject to all the limitations imposed upon the crown by the Long Parliament during the first ten months preceding the recess when its members were able to strike as one man against abuses that pressed alike upon all, — it being at the same time understood that the commonwealth legislation should be treated as void,¹ excepting only such parts as were confirmed by express enactment. Upon that basis both parties united in the invitation to Charles to return, while he upon his part bound himself in the declaration sent to the houses from Breda (1) to grant a free and general pardon to all, excepting only such as should afterward be excepted by Parliament; (2) to indemnify the church and the royalists for injuries suffered in their estates; (3) to make a satisfactory settlement with the army; (4) and finally to secure "liberty to tender consciences, and that no man shall be disquieted nor called in question for differences of opinion in matters of religion which do not disturb the peace of the kingdom."² Before entering upon the task of giving to those guarantees the forms of law, the Convention called into being by the Rump declared, while the bishops were still legally excluded from their places in the upper house, that the Long

¹ Cf. Stephen, *History of the Criminal Law*, ii. 466.

² *Lords' Journal*, xi. 7, 10.

Parliament was dissolved, and that it was in fact "the two houses of Parliament, notwithstanding the want of the king's writ and summons, and as if his majesty had been present in person at the commencement thereof,"¹ — a declaration which the succeeding Parliament indirectly discredited by always describing the Convention in its journals as "the last assembly."² Passing over the fate of the Regicides, the disbandment of the standing army and the reorganization of the militia, the exclusion of commonwealth clergy from church livings, and the restoration and election of bishops, comment must be made as to the reorganization of the finances on a new basis.

After appropriating the customs to the crown's ordinary expenses,³ a successful attempt was made to substitute a new source of income in lieu of the sum the crown had so long received as a part of the ordinary revenue from the incidents of feudal tenures, an obnoxious form of taxation that ceased to be enforced during the civil war after the extinction of the court of wards and liveries, which sat for the last time February 24, 1645. In order to prevent a revival of that institution an act⁴ was passed abolishing the entire obsolete system of military tenures, together with the court in which they were enforced. It was expressly declared that all kinds of tenures held of the king or others be converted into free and common socage, excepting only those in frankalmoigne, copyholds, and the honorary services of grand serjeantry.⁵ At that time it was that the old Tudor subsidy was abandoned⁶

Reorgani-
zation of
finances.

Military
tenures
abolished.

Old Tudor
subsidy
abandoned.

¹ 12 Car. II., c. 1.

² The royalist lawyers claimed that as this Parliament had been called without the king's writ, its acts could never have any validity until confirmed by a genuine Parliament. Cf. *Life of Clarendon*, p. 74.

³ See Dowell, *History of Taxation*, ii. 15-37.

⁴ 12 Car. II., c. 24. Cf. Digby, *Law of Real Property*, pp. 394-398.

⁵ The duke of Marlborough holds Woodstock by that tenure (see *Woodstock Manor*, by Rev. E. Marshall); and the duke of Wellington, the Strathfieldsaye estate in the same way (see Burge, *Peerage*, s.v. Wellington).

⁶ Dowell, *History of Taxation*, ii. 29, 30.

and its place supplied by the new assessment system, first employed by the commonwealth, which, after the famous agreement between the lord chancellor and the archbishop Sheldon in 1664, was applied to both clergy and laity. Thus while it may be true that the commonwealth failed to bequeath a single permanent organic law to posterity, the fact remains that its legislation worked a revolution in the methods of English taxation. Charles so organized his first ministry as to divide the great offices of state between the chiefs of the Presbyterians and the royalists, whose influence was nearly equal in the popular branch of the Convention. In order to break up that system of balance and compromise, Clarendon, who took the lead, dissolved the Convention in December¹ and ordered new elections, which resulted in the return of a great royalist majority, confronted by a Presbyterian opposition now reduced to not more than fifty members. Thus armed, Clarendon boldly entered upon the execution of his policy of reconstruction, which contemplated first the reestablishment of the national church upon a basis that would enforce uniformity upon all who had escaped from its fold; second, the restoration to the crown of all its prerogatives, except such as had been extinguished during the first session of the Long Parliament. Charles's second Parliament, which met on the 8th of May, 1661, and which continued with long adjournments and prorogations for nearly eighteen years, opened its session with an order that every member should take the communion, and that the Solemn League and Covenant should be burned by the common hangman at Westminster.² In harmony with that policy, Parliament passed an Act of Uniformity,³ the fourth since the Reformation, the

A system of balance.

Clarendon.

His policy of reconstruction.

Second Parliament, May, 1661.

Notable acts.

¹ *Life of Clarendon*, p. 76; *Parliamentary History*, iv. 141, 152.

² *Commons' Journal*, May 17, 1661.

³ 13 and 14 Car. II., c. 4. An act was also passed "for the well-governing and regulation of corporations" (13 Car. II., st. 2, c. 1), imposing a religious test intended to depress the political influence of the Presbyterians.

Conventicle Act of 1664,¹ the Five-mile Act of 1665,² and the seditious Conventicle Act of 1670.³ In 1665-1666 the rights of Parliament to appropriate supplies and to audit public accounts were revived as permanent principles in the restored constitution. In the mutilated form in which the pruning knife of the Long Parliament had left it, Charles II. revived the privy council and, following in the footsteps of his predecessors, he continued the practice of selecting out of what was now a purely political and administrative body an inner group of special advisers, for greater "secrecy and dispatch,"⁴ known for a time as the Cabal. After the passage of the Test Act⁵ of 1673, "for preventing dangers which may happen from popish recusants," Ashley, one of the Cabal,⁶ when he learned the secret of the king's religion, resolved to be duped no longer. He united himself with the opponents of the court, now known as the country party, and with them not only opposed the marriage of James with a Catholic princess, but also attempted to bring about an end of the war by a parliamentary declaration that no further supplies would be granted until additional guarantees should be given against the influence of Catholic councilors. The leadership of the court party soon passed to Danby, whose fatal letter⁷ to Montagu in May, 1678, resulted in his impeachment in December,—a case memorable for the five grave questions of constitutional law involved in its discussion.⁸ On the 24th of January, 1679, the Parliament of 1661, after a longer unbroken life than any other in English history, was at last

Rights of appropriation and audit.

The Cabal.

Ashley.

The country party.

Danby and his impeachment.

¹ 16 Car. II., c. 4.

² 17 Car. II., c. 2.

³ 22 Car. II., c. 1.

⁴ See Todd, *Parliamentary Government in England*, i. 226, citing Temple, *Memoirs*, iii. 45 n.

⁵ 25 Car. II., c. 2.

⁶ Clifford, Arlington, Buckingham, Ashley, and Lauderdale, whose initials happened to make up the word "Cabal."

⁷ To satisfy Danby's scruples the king with his own hand wrote as a postscript, "This letter is writ by my order, C.R." See Danby's defense, *Memoirs relating to the Impeachment of the Earl of Danby*, 1710, pp. 151, 227.

⁸ See Taylor, *The Origin and Growth of the English Constitution*, ii. 375-376.

dissolved, and the impeachment it had begun against Danby was revived in Charles's third Parliament, which began on the 6th of the following March, determined to overthrow an administration believed to be secretly friendly to the Catholic cause. When the Long Parliament abolished in 1641 the star chamber, it continued the censorship, and in order the more effectually to enforce it against its royalist and theological adversaries, it promulgated a set of tyrannical ordinances that prompted Milton¹ to cry out in his *Areopagitica* that the suppression of truth by the licenser was an attempt to slay "an immortality rather than a life." After the Restoration the censorship was revived and given a strictly legal foundation by the Licensing Act of 1662, a temporary statute kept in force by renewals down to the meeting of Parliament in March, 1679. By that Parliament, dominated by Shaftesbury at the head of the country party, the yoke was first broken by a refusal to renew the act.² The same body that thus attempted to secure freedom of discussion by refusing to renew the censorship of the press passed the famous "act for the better securing of the liberty of the subject, and for prevention of imprisonment beyond seas," generally known as the Habeas Corpus Act,³ a remedial measure intended to destroy all the devices then employed to deny to imprisoned persons the right to an immediate examination by a court of law into the legality of their imprisonments,—a right inherent in the law of the land as expressed in the Great Charter, and specially discussed in the case of the Five Knights in 1627. While the Short Parlia-

Censorship
of the press.

Habeas
Corpus
Act.

¹ *Works*, iv. 400, ed. 1851.

² Then it was that the twelve judges with Scroggs at their head declared it to be a crime by virtue of the common law, regardless of the act of Parliament, to publish any public news, whether true or false, without a royal license. Carr's case, 1680, *State Trials*, p. 929. Not until 1765 was that monstrous doctrine judicially condemned by Chief Justice Camden, in the case of *Entick v. Carrington*, *State Trials*, xix. 1030. See also *Broom's Constitutional Law* by Denman, p. 555.

³ 31 Car. II., c. 2.

ment of 1679 was thus paving the way for freedom of discussion and fixing upon a new basis the right to personal freedom, its leaders were absorbed with the question of the succession, which, after stirring the nation to its depths during this and the whole of the succeeding reign, culminated at last in the Revolution of 1688. With the great wave of popular excitement put in motion by the "popish plot" behind him, Shaftesbury introduced into the house a bill to exclude the Catholic James from his right to the crown, which was to pass upon the death of Charles to the next Protestant in the line of succession. As a counter blast, the king sent to the house a bill of securities so framed as to permit James to succeed shorn of all real power in church and state, which was to be vested in the two houses.¹ Despite that visionary scheme the commons, after listening to exciting extracts tending to show James's complicity with the plot, passed the Exclusion Bill in May by a large majority.² To prevent further agitation of the subject in the lords, Charles dissolved Parliament on the 10th of July.³ When the new Parliament, called at the time of the dissolution, was prorogued, Shaftesbury organized a formidable agitation, consisting of the signing of petitions in every district, which demanded that Parliament should be permitted to sit for the suppression of popery and despotism. At this time it was that the country party, who were the "petitioners," came to be known as the Whigs, and the cavalier or court party, who were the "abhorrrers," came to be known as Tories.⁴ When Parliament did meet in October, 1780, the house resolved "that a bill should be introduced to disable the duke of York

Question of succession.

First exclusion bill.

Whigs and Tories.

¹ Temple, ii. 501; James, *Memoirs*, p. 548; *Commons' Journal*, April 30.

² 207 against 128. *Commons' Journal*, May 21.

³ Temple, ii. 509-512.

⁴ The former a term of reproach originally applied to the extreme covenanters of the west of Scotland, and the latter a term then employed to describe a native Irish outlaw or "bogtrotter."

from succeeding to the imperial crown of England,"¹ which was promptly passed without a division.² But the House of Lords still stood firmly by the king, and the bill was there rejected by a vote of sixty-three to thirty voices.³ In Charles's fifth and last Parliament, which met in March, 1681, at Oxford, on account of the supposed disloyalty of the capital, another failure to settle the succession occurred. When the leaders of the popular party were deprived, by two dissolutions,⁴ of the support of the houses, the contest became an unequal one, and the king, backed by the tide of reaction that now set in in his favor, turned fiercely upon the Whig chiefs, who had tried in vain to bend him to their will. After trampling them in the dust by means of the judicial power,⁵ Charles proceeded to make his victory complete by directing the same engine against their strongholds, the towns, now called upon by writs of *quo warranto* to show cause why their charters should not be forfeited by reason of their abuse of privileges.⁶ When in the midst of such prosperous conditions, with his enemies at his feet, Charles was called upon to meet the inevitable, he gave the clew to his mysterious dealings with France, which began in 1670 with the making of the secret treaty of Dover, by a profession of the faith of the church of Rome, in communion with which he died February 6, 1685.⁷

Fifth
and last
Parliament,
March,
1681.

Whig chiefs
attacked by
the judicial
power.

Charles
died a
Catholic.

Passive
obedience
and social
contract
theory.

When the University of Oxford, on the day of Russell's execution, published its famous decree in support of passive obedience, it was at the same time careful to consign to ever-

¹ Bailey, *Succession to the English Crown*, p. 218.

² *Commons' Journal*, November 11.

³ *Lords' Journal*, p. 666.

⁴ On March 28 Charles dissolved his fifth and last Parliament.

⁵ As to the trials growing out of the Rye House Plot, see *State Trials*, ix. 577, 823. For a concise statement of the legal questions involved, see Stephen, *History of the Criminal Law*, i. 408-412.

⁶ See North, *Examen*, p. 626; *State Trials*, viii. 1039-1340; Bulstrode, p. 388.

⁷ See the accounts in Lingard, x. 107-110; Green, *History of the English People*, iv. 65, 66.

lasting reprobation the doctrine that all civil authority was originally derived from the people through a compact, express or implied, between the prince and his subjects, whereby the former might forfeit his right to govern by virtue of misconduct.¹ Without a clear comprehension of these two opposing theories, the one claiming the supreme political authority for the crown, the other for the legislature, it is impossible perfectly to understand the full significance of the acts that culminated in the fall of the House of Stuart through what is generally known as the glorious Revolution. At the outset James concealed his real designs under a declaration to the council in which he said, "I shall make it my endeavour to preserve this government, both in church and state, as it is now by law established."² Charles's ministers were continued in office; and a Parliament, assembled in May, 1685, after an interval of five years, granted him for life the customs revenue enjoyed by his predecessors with certain additions.³ No change was made, however, during the reign in the system of direct taxation, "and, as the general result of the arrangements connected with the revenue made under the later Stuarts, we have (1) the continuation of the old system of port duties on merchandise imported, with additional taxes on wine, sugar, tobacco, and French and India linens and silk, and brandy; (2) the substitution, in lieu of the revenue from the feudal tenures and in supplement to the revenue from demesne, of certain items of the commonwealth excise; (3) the imposition of hearth money; and (4) the suppression of the old subsidy in favor of the commonwealth rate or assessment, as a tax for extraordinary purposes."⁴ Not until after the Monmouth rebellion and the

James
dissembled
at the
outset.

Taxation.

¹ July 21, 1683. Wilkins, *Concilia*, iv. 610; Somers, *Tracts*, viii. 420, 424. The decree was publicly burned by order of the House of Lords in 1709.

² James II. 3; Fox, Appendix, 16.

³ 1 James II., cc. 1, 4, 5.

⁴ Dowell, *History of Taxation*, ii. 33.

Monmouth
rebellion
and
"bloody
circuit."

Test Act
assailed.

Commons
demand
recall of
commis-
sions issued
in defiance
of it.

Origin and
character
of dispens-
ing power.

"bloody circuit" did James show his hand. Then, taking advantage of the opportunity furnished by the revolt, which had found the crown unprepared for invasion, he ventured to make a great increase in the standing army, and thus a way was opened for the commissioning of many Catholic officers, in defiance of the terms of the Test Act expressly forbidding it. The king therefore resolved to bring about the repeal of that act, as well as a modification of the Habeas Corpus Act, whose provisions had greatly hampered the crown in commitments made in connection with the recent rebellion. When Halifax ventured to oppose his plans, James dismissed him from the council; and when Parliament manifested the same spirit of resistance, it was prorogued to the 9th of November. Upon the opening of the second session the commons coupled with a grant for the support of the new troops the condition that the king should recall the illegal commissions issued in defiance of the Test Act, lest the continuance of the Catholic officers in the army should "be taken to be a dispensing with that law without act of Parliament." As a counter blast to the resolute opposition of the lower house, earnestly seconded and accentuated by the lords, to any modification of a statute regarded by both as the bulwark of the Protestant cause, James suddenly prorogued Parliament to the 10th of February, 1686; and although it was continued in existence by further prorogations for about eighteen months, it was never again permitted to meet during the remainder of his reign.¹ Thus baffled in his attempt to induce the houses to repeal a fundamental law fatal to his designs, the king resolved to accomplish the same end through the exercise of an ancient prerogative of the crown generally known as the dispensing power, which had been immemorially employed either for the exemption of particular persons for special reasons from the operation of penal laws, or for the

¹ It was finally dissolved in July, 1687.

suspension of an entire statute or set of statutes in conflict with the royal will. This exempting and suspending power,¹ which seems to have had its beginning in England in the reign of Henry III.,² after a continuous conflict between the crown and the legislature as to its existence and extent, was reduced to something like definite form in the reign of Charles II., when in the case of *Thomas v. Sorrel*³ — wherein the jury

*Thomas
v. Sorrel.*

returned a special verdict, on the ground that they found a patent of 9 James I. incorporating the Vintners' Company, with leave to sell wine *non obstante* the statute of 7 Edward VI. — it was held that "*malum per se* cannot be dispensed with; and as to *mala prohibita*, those statutes only may be dispensed with which were made for the kings' profit, but not where they are for the general good, or the good of a third party. He may dispense with nuisances and penal laws, by which no third party has a particular cause of action." After privately consulting the judges, patents under the great seal were issued to the Catholic officers of the army, relieving them from all penalties under the Test Act,⁴ and authorizing them to hold their commissions, "any clause in any act of Parliament notwithstanding." When the validity of the dispensations contained in the patents was tested in the collusive action of *Godden v. Hales*,⁵ eleven judges out of twelve held that they were valid. Thus it was that the judges, plausibly supported by both parliamentary and judicial precedents, attempted to reverse the results of the Revolution of 1640 by declaring that the supreme power of the state was not vested in the king in Parliament, but in the king in council. Armed with

*Godden
v. Hales.*

Attempt to
reverse re-
sults of
Revolution
of 1640.

¹ It is said to have been borrowed from the papal practice of issuing bulls "*non obstante* any law to the contrary."

² As to the rebuke he received from the grand prior of the Hospitallers when he attempted to justify its use by a reference to the papal precedents, see Matthew Paris, *Hist. Major*, p. 854. Also the "Note to the Seven Bishops' Case," in *Broom, Constitutional Law*, Denman's ed., pp. 495-506.

³ Vaughan, pp. 330-339 (25 Car. II. 1674). Such was the law laid down by Coke, 1 Inst. 120 a; 3 Inst. 154 (Cox, *Inst. English Government*, p. 24, note b).

⁴ 25 Car. II., c. 2.

⁵ 2 Shower, 475; *State Trials*, xi. 1165.

Practical
reëstab-
lishment
of High
Commis-
sion.

Theory of
its survival.

Four
Catholic
lords sworn
of the
council.

Declaration
of Indul-
gence.

that fatal weapon, James now threw off the mask, in order vigorously to begin his attack upon the Established Church, regardless of the promise made at his accession to both council and Parliament. In order to provide an engine for the coercion of all ecclesiastics who might dare to oppose his plans, James resolved upon the practical reëstablishment of the Court of High Commission, which had been swept away by the act of the Long Parliament, abolishing the entire system of spiritual tribunals. By the act of 13 Charles II., c. 12, s. 1, that system was restored, excepting only the *ex officio* oath and the High Commission. Upon the theory that only the *extraordinary* powers of the spiritual courts had thus perished, the king, after consultation with the judges, issued a commission in July, 1686, to a new "Court of Commissioners for Ecclesiastical Causes," with Jeffreys, now lord chancellor, at its head, which as a permanent court, was endowed with *ordinary* powers to hear ecclesiastical causes, and to pronounce ecclesiastical censures.¹ A few days later four Catholic lords were sworn of the privy council to strengthen the royal hands against the Tory councilors, opposed to the repeal of the Test Act. At their head stood Rochester, who was dismissed from office early in January, 1687, as evidence of the fact that no one opposed to the king's ecclesiastical policy could hope to participate in the administration of government. Thus bereft of the support of Tory churchmen, James sought popular support from Protestant nonconformists through a Declaration of Indulgence. To obtain such a compliant Parliament as would lend itself to his designs now became the primary object of his policy. But so unsuccessful were his efforts in that direction that the elections fixed for February, 1688, had to be adjourned. When the archbishop and six

¹ When to the jurisdiction of this court, called in derision *Congregatio de Propaganda*, Compton filed a plea, it was treated with contempt, while he was suspended and the administration of his diocese handed over to others. *State Trials*, xi. 1156-1166; *History of King James's Ecclesiastical Commissioners*, p. 2.

of his suffragans ventured to petition the king to relieve the clergy from reading the republication of the Declaration of Indulgence, the seven were committed to the Tower to await a trial for seditious libel which began in June.¹ After a night passed in stormy debate the jury rendered a verdict of not guilty, received with an enthusiastic shout that swelled through the capital and adjoining hamlets until it reached the king himself at Hounslow Heath, where in the midst of his standing army he thus received the first warning of the mighty change soon to come.² Two days after the bishops were committed to the Tower an event occurred which precipitated the Revolution. From the time of James's conversion to Catholicism the nation had been pacified by the assurance that the crown at his death would pass first to Mary and then to Anne, the two surviving children of his first marriage with Anne Hyde. On the 10th of June, Mary of Modena, the Catholic princess whom James had married two years after Anne's death, gave birth to a son, the ill-fated prince generally known as James III., or the old Pretender. Thus it was that the prospect, so long assured, of a Protestant succession was suddenly blasted by the advent of a Catholic heir, just at the moment when James's fierce and persistent attack upon the church he had promised to defend was fast driving the nation to open resistance. In the presence of the emergency thus presented the leaders of the Protestant cause resolved to assume that the birth of a male heir to James was a deliberate invention, and then to invite William to come in arms not only for the defense of English liberty and religion, but also for the restoration of the reign of law which had broken down under the king's attempt to coerce the church

Trial of
bishops for
seditious
libel, June,
1688.

Birth of a
male heir
to James.

Protestant
leaders dis-
credited
the fact.

¹ *State Trials*, xii. 183. See also *Broom's Constitutional Law*, Denman's ed., pp. 406-519; Burnet, iii. 222-226.

² Barillon in his letter to Louis (July 12) said: "La joie et les acclamations ont été fort grandes à Westminster, quand on a su la décision. . . . La populace brula une représentation du pape."

and remodel the magistracy in open defiance of existing statutes. Under the pressure of the common danger Tories and Whigs, high churchmen and nonconformists, putting aside for the moment all differences, drew together; and on the 30th of June the leaders of the coalition subscribed in cipher an invitation to William to come at once at the head of an army strong enough to justify his friends in rising to sustain him.¹ In due time William's declaration arrived, promising freedom of conscience to Catholics and toleration to Protestant nonconformists, and demanding the calling of a free Parliament for the settlement of the succession, and for the re-establishment of English freedom and religion upon a secure basis.² On the 5th of November the prince landed at Torbay at the head of a force including representatives from every part of the Protestant world, which, after a momentary hesitation, was so swelled by adherents from every quarter as to make its advance a peaceful and triumphant progress.

Invitation
to William,
June 30.

He landed
at Torbay,
November 5.

Second
Convention
Parliament.

As there was no Parliament in existence when James's first flight suspended for a time all regular government, it was difficult to determine how to assemble the estates without the king's writ, from which, according to the immemorial legal theory, Parliament derived its being and its powers. For the third time since the Conquest the English people were called upon to set aside that theory in favor of the earlier doctrine that Parliament really derives its existence and authority from the call of the nation from which its life is drawn.³ The Convention Parliament that secured to Charles II. the right to reign was called not by a royal writ, but by the authority of the Long Parliament, which had protected itself

Absence of
the king's
writ.

¹ Burnet, iii. 265.

² Dumont, vol. vii., pt. ii., pp. 198, 205. He was "called in to vindicate practically those maxims of liberty for which, in good and evil days, England had contended through so many centuries." Taylor, *Book of Rights*, p. 211.

³ As to the constitution of the Parliament of 1399, wherein Richard II. was deposed and Henry IV. elected, see Taylor, *The Origin and Growth of the English Constitution*, ii. 407.

by positive law against either a prorogation or dissolution without its own consent. William was now called upon to convene the estates without the aid either of the king's writ or the mandate of a preceding Parliament. In the presence of such difficulties, he resolved, by virtue of his own *de facto* authority, to call together representatives who had in time past been honored with the confidence of the nation. By their advice he issued circular letters to all the constituent bodies of the kingdom inviting them to send up as usual persons to represent them in a convention of estates to be held at Westminster on the 22d of January, 1689.¹ The elections were rapidly concluded, and at the appointed time the peers, about a hundred in number, met under the presidency of Halifax, while the commons organized themselves by calling Powle to the chair. In the course of its proceedings the assembly proclaimed itself to be "the two houses of Parliament, and so shall be and are hereby declared enacted and adjudged to be to all intents, constructions, and purposes whatsoever . . . as if they had been summoned according to the usual form."² However, notwithstanding that declaration, the succeeding Parliament deemed it necessary to pass an act declaring the action and proceedings of its predecessor valid.³ The high function the Convention was first called upon to perform involved no less than the deposition of James, who had declared that he had left the realm only because his life was in danger, and the election of William and Mary to the vacant throne, — a proceeding that would have been at once natural and easy had the mind of the nation been swayed by the obsolete and forgotten precedents of pre-Norman times under which the witan of Wessex once deposed

Expedients
employed
by William.

Convention
declared
itself to be
"the two
houses of
Parliament."

Deposition
of James
and election
of William
and Mary.

Pre-
Norman
precedents.

¹ Clarendon, *Diary*, December 24, 1688; *Parliamentary History*, v. 62; *London Gazette*, December.

² 1 Will. and Mary, sess. 1, c. 1.

³ See *Commons' Journal*, April 8 and 9, 1690. Although Macaulay comments at length upon the passage of the confirming act (ii. 160), Freeman says no such act was passed. *Growth of the English Constitution*, p. 137.

Feudal
theory of
kingship.

Supple-
mented by
divine right
and passive
obedience.

Division of
parties.

Appeal to
philosophy
of Hobbes.

Sigeberht from the royal dignity and elected his relative, Cynewulf, in his stead.¹ The fact was, however, that this early conception of an elective and deposible king had been supplanted ages before by the hereditary theory, which, under the influence of feudal ideas, gave birth to the doctrine that the throne can never be vacant because the king never dies; that there can be no such thing as an interregnum, because the reign of the heir begins the moment that of his predecessor is ended. To that doctrine, which, according to the claim of Edward IV., constituted such an indefeasible hereditary title as Parliament can neither ignore nor set aside, James I. added the claim of divine right, supplemented in the reign of Charles II. by the religious dogma of non-resistance or passive obedience, invented by servile churchmen who were the first to repudiate it. Such was the nature of the kingship with which James claimed to be clothed when he and his infant heir were forcibly driven from the palace of their ancestors to seek shelter in a foreign land. The main body of the convention was divided, as was the nation itself, into two parties, Tories and Whigs, the former being in the majority in the upper, the latter in the lower house. When on the 28th of January, 1689, the battle began in the commons, the Whigs, who were thus charged with the responsibility of power, attempted to solve all theoretical difficulties, not by appealing to the simple yet obsolete precedents of earliest times, but by boldly employing the new-fangled political philosophy of Hobbes, resting upon the unhistorical assumption of an original contract between the nation and the king, under which the latter might forfeit his rights by misconduct. By the aid of that theory the popular party was able to unite every element of the opposition to James, in passing without a division the famous resolution declaring "That King James II., having endeavored to subvert the constitution of the kingdom by

¹ *English Chronicle*, a. 755; *Flor. Wig.* a. 755.

breaking the original contract between king and people, and having, by the advice of Jesuits and other wicked persons, violated the fundamental laws, and withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby vacant." After sharp opposition the lords finally agreed to adopt the original resolution of the commons without amendment; and that action was followed by a resolution in which the upper house declared that the prince and princess of Orange should be proclaimed king and queen of England, and of all dominions thereto belonging.¹ The commons refused, however, to concur in such a hasty settlement of the crown until a formal document could be drawn up setting forth in clear and solemn form the fundamental principles of the constitution in accordance with which the new dynasty was expected to govern.² That duty was intrusted to a committee whose chairman was John Somers, a young barrister, who had distinguished himself in the trial of the bishops; and after some unimportant amendments by the lords, the Declaration of Right, which thus came into being, was approved by both houses on the 12th of February.³

Social contract theory embodied in resolution.

Commons insist upon a declaration of principles.

Declaration of Right.

The Declaration of Right thus put forth was a summing up in a dogmatic form of that code of positive law regulating the prerogatives of the crown, the privileges of Parliament, and the liberty of the subject, now generally known as "the Law of the Constitution,"⁴ as distinguished from that body of political maxims, of silent understandings, undefined either by common or statute law, which have been invented since the beginning of the reign of William III., as the most convenient means of regulating the changed relations of the two

A summing up of "the Law of the Constitution."

¹ The first proposition was carried by a majority of four; the second, by a majority of about twenty. *Lords' Journal*, pp. 118, 119; Clarendon, *Diary*, February 6; Dalrymple, Appendix, 340.

² *Parl. Hist.* v. 52, 58; Burnet, p. 822.

³ *Commons' Journal*, February 4, 8, 11, 12; *Lords' Journal*, February 9, 11, 12, 1688-1689. On the 12th of February Mary arrived in England.

⁴ See Dicey, *Introduction to the Study of the Law of the Constitution*, 1893.

Recent
grievances,
religious
and politi-
cal, defined.

houses to each other and of the crown to both, necessarily resulting from the transfer through the Revolution of the sovereignty of the state from the crown to the legislature. In that practical temper which has always characterized Englishmen on such occasions, the Declaration entered directly upon the question of recent grievances by asserting that King James II., misled by evil counselors, did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of the kingdom by an abuse of the dispensing power; by erecting the court of commissioners for ecclesiastical causes; by denying Parliament's exclusive right of taxation; by maintaining without its consent a standing army in time of peace, and by quartering soldiers contrary to law; by disarming good Protestants when papists were armed and employed contrary to law; by violating the freedom of election of members to serve in Parliament; by prosecutions in the king's bench for matters cognizable only in the houses; by the return of partial and corrupt juries, especially in trials for high treason; by the exaction of excessive bail; by the imposition of excessive fines and the infliction of cruel and illegal punishments; and finally by promising away estates as forfeited prior to the conviction of the persons to whom they belonged. In order to put an end to these mighty evils, the prince of Orange had come as "the glorious instrument of delivering this kingdom from popery and arbitrary power." Therefore, in order to make that deliverance perpetual, the new sovereigns were called upon to join the estates in declaring illegal the suspending and dispensing powers, the commission for ecclesiastical causes, all forms of conciliar taxation, all attempts to deny the rights of petition, a standing army in time of peace, denial of the right to bear arms, denial of free elections, denial of freedom of speech, excessive bail and cruel punishments, juries improperly chosen, promises of forfeiture before conviction, and the denial of frequent

Summary
of acts
declared
illegal.

parliaments. The throne was then declared vacant, and William and Mary, king and queen, during their lives, and the life of the survivor of them. In default of heirs the crown was to pass to Anne of Denmark and the heirs of her ¹ body. Thus the indefeasible hereditary theory was set aside in favor of the doctrine that an English sovereign is now as much the creature of an act of Parliament as the pettiest taxgatherer in the realm. After a recess the act ² was passed turning the Declaration of Right into a formal Bill of Rights, whereby two somewhat important additions were made as new barriers against a possible Catholic sovereign, and against the dispensing power. No attempt was made, however, to secure freedom of speech and of the press to the nation as a whole. The original instrument, which entirely ignored the right last named, only guaranteed the former so far as proceedings in Parliament were concerned.³ In like manner the right to regulate English commerce, which the houses shortly afterward silently claimed and obtained in the discussions on the charter granted to the East India Company, was left as of old to the control of the crown.⁴ In order to give the highest possible security to the sovereignty with which the Revolution had crowned them, the houses resolved to assume more perfectly than ever before the control of both the purse and the sword. The power to withhold supplies was emphasized, while the principle, imperfectly recognized in the reign of Charles II., that money voted by Parliament could be appropriated only by its direction to certain specific heads of expenditure, has since the Revolution become the settled usage. Thus came into being at that time what is known as the "Civil List," a term originally used to designate the sources of revenue appropriated to produce a fund out of which was

Parliamentary settlement of succession.

A formal Bill of Rights.

Freedom of speech.

Regulation of commerce.

Supply and appropriation.

"Civil List."

¹ "And for default of such issue to the heirs of the body of the said prince of Orange." *Lords' Journal*, v. 125.

² 1 Will. and Mary, sess. 2, c. 2.

³ § 9.

⁴ Cf. Green, *History of the English People*, iv. 46.

Annual
appropriation
bills.

Triennial
Bill of 1694.

Mutiny Act
of 1689.

Two vital
principles.

to be defrayed the expenses of the royal household and of certain civil officers, such as judges, ambassadors, and the like, of which a list had been laid before the house.¹ The necessary result of that arrangement was annual appropriation bills, into which were introduced clauses forbidding the lords of the treasury under heavy penalties to order by their warrants the payment of any moneys in the exchequer except such as were specially appropriated. Hence the rigid legal rule of the modern constitution which provides that not a penny of the national revenue can be expended without the authority of some act of Parliament.² The grant of the port duties to William for four years was soon followed by the resolve to make the vote of supplies an annual one, and so it came to pass that Parliament must meet at least once a year in order to keep the machinery of the state in motion. As an addition to the perfect control over the executive power thus practically vested in the House of Commons was enacted the Triennial Bill of 1694,³ forbidding the existence of a Parliament for more than three years. The statesmen of the Revolution, imbued with the hatred of a standing army born in the days of the commonwealth, resolved, after providing that no such thing should exist in time of peace without the consent of Parliament, to make its support and discipline at all times depend absolutely upon the will of that body. With that end in view was passed the first Mutiny Act of 1689,⁴ whose object and principles are the same as the Army Act, 1881,⁵ under which the regular army is now substantially governed. The two vital principles underlying that system are these: first, that no pay can be issued to the troops without a pre-

¹ Dowell, *History of Taxation*, ii. 43, 44; *Parliamentary History*, p. 193.

² "This authority may be given by a permanent Act, as, for example, by the Civil List Act, 1 and 2 Vict., c. 2, or by the National Debt and Local Loans Act, 1887; or it may be given by the Appropriation Act, that is, the annual Act by which Parliament 'appropriates' or fixes sums payable to objects . . . not provided for." Dicey, *The Law of the Constitution*, p. 295.

³ 6 Will. and Mary, c. 2. ⁴ 1 Will. and Mary, c. 5. ⁵ 44 and 45 Vict., c. 58.

vious appropriation by Parliament; second, that no officer or soldier can be punished for disobedience, nor any court martial held, save through an annual reënactment of the Mutiny Bill. A soldier, although a member of a standing army, is still a subject endowed with all the rights and duties of an ordinary citizen, and as such is amenable to "the ordinary process of law."¹ It is, therefore, only in his military capacity, which is simply superimposed upon his civil, that he can be tried and punished by court martial. The civil courts, however, reserve the right to determine what persons are subject to the military law; and in the event that either an officer or a court martial exercises authority over a soldier not authorized by that law, such courts also reserve the right of supervision, which may be enforced by prohibition, certiorari, or habeas corpus, according to the facts of the particular case.²

Every
soldier a
citizen.

Court
martials
subject to
review.

Despite such supplementary legislation the deficiencies of the Bill of Rights, made obvious by time and circumstances, were never fully remedied until the passage in 1701 of the famous Act of Settlement,³ the constitutional capstone of the Revolution. In December, 1694, Queen Mary had been carried off by smallpox, and in July, 1700, the duke of Gloucester had died, leaving Anne childless. Ignoring James's son, the next in line, according to the ordinary rules, were the descendants of Henrietta of Orleans, the daughter of Charles I., whose daughter, Anna Maria, had married the Catholic duke of Savoy in April, 1694.⁴ Under that condition of things Parliament resolved to cling to the Stuart blood, and yet

Act of
Settlement
capstone of
Revolution.

¹ The first Mutiny Act so provided expressly (s. 6). Cf. Clode, *Military Forces of the Crown*, i. 499, 500. A soldier is also subject to the same criminal liability as a civilian.

² *Manual of Military Law*, pp. 177, 178. "It should, however, be noted that the courts of law will not, in general at any rate, deal with rights dependent on military status and military regulations." Dicey, *The Law of the Constitution*, p. 287, note 1.

³ 12 and 13 Will. 111, c. 2.

⁴ "The duchess of Savoy entered an unavailing protest against the new settlement. She lived to see it take effect, dying on the 26th of August, 1728." Bailey, p. 233.

Source of
title of
House of
Hanover.

Eight
additional
articles for
security of
"religion,
laws, and
liberties."

Toleration
Act and
slow growth
of religious
liberty.

secure a Protestant succession, by vesting the crown in Sophia, wife of the late and mother of the then elector of Hanover, who was nearly the youngest of the thirteen children of Elizabeth, queen of Bohemia, and daughter of James I. The crown was to "continue to the said most excellent Princess Sophia and the heirs of her body, being Protestants," after the death of William and Anne, and in default of their issue. In order more perfectly to secure the "religion, laws, and liberties," of the realm after the accession of the new dynasty thus created, it was deemed necessary to embody in the Act of Settlement itself eight additional articles that were to take effect only after the happening of that event. The four that became permanent elements in the constitution provide: (1) that whosoever shall come to the possession of the crown shall be in communion with the state church; (2) that no war shall be undertaken for dominions not belonging to the British crown; (3) that the judges, whose salaries shall be ascertained and established, shall hold during good behavior, subject to removal upon the address of both houses of Parliament; (4) that no pardon under the great seal shall be pleaded to an impeachment by the House of Commons. While the parliaments of William and Mary thus attempted to secure by adequate legislation the political liberty he had promised to reëstablish, they undertook, in a narrow and jealous spirit, to guarantee religious toleration to the great body of non-conformists who had united with churchmen in the common struggle against Catholicism. William failed to secure either the passage of a Comprehension Bill or the repeal of the Corporation Act, while the Toleration Act of 1689¹ was for the benefit of Protestant dissenters only. Not until 1828 was Lord John Russell able to bring about at last the civil enfranchisement of dissenters through the repeal of the Test and Corporation Acts, by virtue of which civil disabilities were

¹ 1 Will. and Mary, c. 18.

still imposed.¹ Two acts of Elizabeth — one of 1581, the other of 1593 — that continued nominally in force, subject to the provisions of the Toleration Act, were repealed in 1844;² and that section of her Act of Uniformity imposing a penalty of a shilling for non-attendance at church was repealed in 1846.³ The Toleration Act expressly provided that its terms should not be so construed as “to give ease, benefit, or advantage to any papist or popish recusant whatever”; and in 1700 a penal law against Catholics was passed so severe in its terms as to render its enforcement impossible. Despite the acts of 1778⁴ and 1791⁵ for the emancipation of Catholics, they continued subject to many disabilities, which deprived them not only of the right of holding office, but also of sitting in Parliament down to the year 1829, when a Tory ministry passed, with the aid of the Whigs, and in order to prevent civil war, the Catholic Emancipation Act⁶ of that year, by which all such disabilities were swept away. The history of the process through which religious liberty was thus gradually established in England by the repeal of the disabling acts directed against all nonconformists, whether Catholic or Protestant, has been epitomized as follows: “The Revolution of 1688 produced a narrowly limited toleration, in the strict sense of the word, for Protestant Dissenters. ‘You are a set of narrow-minded bigots, but we will not punish you for it,’ was the language of the legislature toward them. The Roman Catholics, on the other hand, were treated as men who would be rebels if they dared, and were placed under laws nominally harsher than any which had been in force before. The laws, however, were not executed and, after being practically repealed in 1791 and 1829, were formally repealed in 1844 and 1846.”⁸

Emancipation of Catholics.

Stephen's epitome.

Taxation and finance.

Reference has been made to the old Tudor subsidy, super-

¹ 9 Geo. IV., c. 17.

² 7 and 8 Vict. 102.

³ 9 and 10 Vict., c. 59.

⁴ 11 and 12 Will. III., c. 4. For a commentary upon it, see Burnet, iii. 253.

⁵ 18 Geo. III., c. 60.

⁶ 31 Geo. III., c. 32.

⁷ 10 Geo. IV., c. 7.

⁸ Stephen, *History of the Criminal Law*, ii. 496.

Subsidy
superseded
by assess-
ments.

The rate
system.

Origin of
land tax.

Origin of
national
debt.

Permanent
income tax.

seded during the great civil war by a system of monthly assessments, under which a fixed sum to be raised was partitioned between the several counties and towns wherein the taxpayers were rated by the local authority at what they were really worth. But that method, emphasized in 1688, became inequitable by reason of the "exorbitant inequality of the old proportions of charge, both between county and county, division and division, and parish and parish."¹ Therefore, in 1689, a new plan was adopted, consisting of a rate of so many shillings in the pound in respect to incomes derived from personal property, offices and employment, and lands; and in 1692, a rate then imposed of 4s. in the pound produced about £1,922,000. When that sum began to decline through imperfect assessments, Parliament "abandoned the principle of a rate by *fixing what a rate should produce*."² Such was the origin and character of the land tax of William's reign, which continued in force down to 1798, when Pitt, prior to the introduction of his income tax, made it perpetual at 4s. in the form of a redeemable rent charged on the several districts. His famous income tax, first levied in 1798, consisted of the imposition of a tax of ten per cent upon all incomes arising from annual rent and profits. Though levied as a war tax which was to cease at the declaration of peace, it was immediately pledged to a loan, and thus after being repealed and reimposed, it has become like the land tax a permanent element in the national revenue.³ At the moment when the nation began to rebel against the alarming growth of taxation made necessary by the prolonged struggle with France, Charles Montagu, afterward Lord Halifax,⁴ proposed

¹ And thus the assessment became "as impolitic and unreasonable a method of raising great sums of money as ever was introduced in any nation." Halifax, *Essay*; Somers, *Tracts*, iv. 63.

² Dowell, *History of Taxation*, ii. 49, 50, and 51.

³ *Ibid.* ii. 182-228, 230, 332.

⁴ His "Life" is embraced in his *Political Works*, published in 1716. His *Miscellaneous Works* were published in 1704; and his *Life and Miscellaneous Works* in 1715, London.

in December, 1692, that England should adopt the continental plan of lightening the annual burden resulting from war by contracting a national debt. And in order to improve upon the old methods of borrowing from the London goldsmiths, whose credit with capitalists had been seriously shaken by the closing of the exchequer by the Cabal, Montagu resolved to utilize a plan of a national bank, such as already existed in Holland and in Genoa, previously suggested by a Scotchman, William Patterson. Thus it was that in the spring of 1694, when another great loan became necessary for the sustenance of the war, Montagu introduced a bill for the incorporation of the Bank of England.¹

Bank of England incorporated, 1694.

20. A brief account has been given of the inner circle of the privy council, — first reproachfully termed “the *Juncto*”² or “Cabinet Council” in the reign of Charles I., and “the Cabal”³ in that of Charles II., — which, as a secret committee of the king’s personal advisers, directed the royal administration down to the Revolution of 1688. William and Mary inherited the system of government by cabinets composed of ministers, each one of whom could be appointed and removed by the king without the consent of the rest, and each one of whom as a mere servant of the crown was directly responsible for the performance of his special duties to it alone. While such ministers were members of Parliament, they could not unite among themselves in carrying out any joint scheme of government because there was no internal cohesion growing out of the possession of common political principles. How to remove that fatal evil arising out of the lack of power upon the part of the cabinet to act as a unit with the majority of the popular chamber, in which the real sovereignty was vested, was the question of questions, whose answer the statesmen of the Revolution left to those who came after them. The mod-

Growth of the modern ministerial system.

Conditions under William and Mary.

Lack of internal cohesion.

Statesmen of Revolution.

¹ The bill, which originated in the commons as a money bill, passed the lords without amendment in April. See *Lords’ Journal*, 23d and 24th of April, 1694.

² Clarendon, *History of Rebellion*, bk. ii., p. 226.

³ See above, p. 387.

tion failed to meet difficulty.

Change brought about through a set of tacit understandings.

Things of which the positive law knows nothing.

Cabinet has no legal existence.

Mainspring of modern constitution.

Conventional as distinguished from written code.

ern ministerial system, through whose silent growth the sovereignty of the British Empire has been transferred from the king to the House of Commons, is the fruit of the final triumph won by Parliament over the monarchy in the Revolution of 1688. The Revolution settled the principles that made the great change inevitable, and then left it to time to press them to their ultimate conclusion, through a set of tacit understandings, of which the positive law knows nothing, and of which there is no written memorial. No such body as a cabinet is known to English law; no such office as that of prime minister is recognized by any statute; there is no legal provision that requires a king to appoint ministers of whom the House of Commons approves, or to dismiss ministers of whom it does not approve; the law knows nothing of the collective responsibility of ministers; it knows nothing of their duty to resign, or to appeal to the country, when they are rebuked by an adverse vote of the popular chamber. Of the existence of the privy council the law is aware, but of the inner circle of the privy council, called a cabinet, it knows absolutely nothing. The meetings of the inner circle are secret, and its proceedings, which are highly confidential, are not even recorded. From a strictly legal standpoint, the cabinet is a mere phantom which passes between the Parliament and the crown, impressing the irresistible will of the one upon the other. And yet, from a political and practical standpoint, the cabinet is the mainspring of the modern constitutional system. So long, and only so long, as the royal authority is wielded in obedience to the will of the majority of the House of Commons does the machinery of government continue in motion. The unwritten and conventional code of tacit understandings — out of which the existing ministerial system has been slowly evolved, and from which it derives moral and political as distinguished from legal authority — has, within the last two centuries, grown up by the side of the older code of written constitutional

law, from which it must be sharply distinguished.¹ At the end of the Revolution of 1688 the written code had reached its completion; at that time the Great Charter, the Petition of Right, the Bill of Rights, and the Act of Settlement, when taken together, defined the prerogatives of the crown, the privileges of Parliament, and the rights of the subject with about as much precision as an American constitution now defines the relative rights and duties of governors and governed. The written code contained in these four documents, like an American constitution contained in one document, did not pretend to be complete within itself; for details and definitions it depended, as an American constitution now depends, upon that strange mixture of tradition and precedent generally known as the English common law. Down to the Revolution of 1688 the written code thus supplemented and explained by the customary law was the constitution. No distinction had yet been drawn between the constitution and the law. Any act which failed to offend against some provision or principle either of the written code or of the customary law could be in no sense illegal. With that fact clearly in view it becomes easier to explain the nature of the conventional and extra-legal constitution which has grown up alongside of the written code, and which, without altering its outward form, has completely changed its practical working. By the Bill of Rights the legal character of the kingship was fully recognized and reestablished with all the prerogatives inherent in the crown prior to the usurpations introduced by the Tudor and Stuart kings. After the Revolution settlement, as before, the king still possessed the absolute legal right to assemble, prorogue, and dissolve Parliament, and to

Embodied
in certain
documents.

No distinction
between law
and constitution
prior to the
Revolution.

Legal
character
of kingship
then reestablished.

¹ "We now have a whole system of political morality, a whole code of precepts for the guidance of public men, which will not be found in any page of either the Statute or the Common Law, but which are in practice hardly less sacred than any principle embodied in the Great Charter or in the Petition of Right. In short, by the side of our written law there has grown up an unwritten or conventional constitution." Freeman, *Growth of the English Constitution*, p. 114.

refuse his assent, as a coördinate branch of the legislature, to any bill the two houses might enact. As the supreme executive he retained the control of foreign affairs through the sending and receiving of ambassadors, the contracting of treaties and alliances, and the making of war and peace. In the same capacity he acted at home as the general conservator of the peace, the guardian of the public health, the arbiter of commerce, and as the supreme head of the army and the fleet. As the fountain of justice he still appointed the judges, and prosecuted offenders whose crimes he alone could pardon after conviction. As the fountain of honor he could create peers, bestow titles, offices, and pensions, and erect corporations. As the head of the national church he could appoint prelates, and prorogue, regulate, and dissolve all ecclesiastical synods and convocations, whose canons were valueless unless made by his leave and with his approval. And last and most of all, he still possessed the legal right, after the Revolution as before, to appoint his own ministers and to dismiss them at his pleasure. But under the unwritten conventional constitution which has grown up alongside of the written code since that time it is understood that the crown can neither appoint ministers of whom the House of Commons does not approve, nor dismiss ministers of whom it does approve. And it is also understood that while such ministers are in office all the legal prerogatives of which the Crown is possessed by virtue of the written law shall be entirely subject to its direction and control. By virtue of such understandings the king reigns and the ministers govern; and "the king can do no wrong," because all unwise and improper acts are those of his ministers, who can be promptly and sufficiently punished simply by a dismissal from office. Thus it is that the sovereign powers of the state are exercised by virtue of positive law through a political body whose existence that law does not recognize, and whose highest duties

Legal prerogatives
subject to
ministerial
control.

and responsibilities are neither defined in it nor punished by it. Out of that condition of things has grown the distinction, now well understood by English lawyers and statesmen, between the conventional constitution and the law; between acts which may be unconstitutional and yet not illegal. The cabinet ministers may, individually or collectively, commit some breach of the written law, which may be in the strictest sense of the term an illegal act, for which they may be punished in the ordinary tribunals, or by the extraordinary process of impeachment in the high court of Parliament. At the same time such ministers may commit a grossly unconstitutional act which in no sense of the term can be called illegal, and of which no cognizance can be taken in any court whatsoever. Such an offense would be committed should the ministers refuse to resign office after a vote of censure had been passed upon them in the House of Commons. No court could compel them to resign, and yet their act would constitute the most highly penal offense that could be committed against the modern constitution. The best possible reason which can be given for the absence of any legal method of punishment for such an act is that the House of Commons holds in its own hands a political method of coercion which is at once summary and irresistible. When the ministers under proper circumstances refuse to resign, the house can compel obedience by simply refusing to keep the machinery of government in motion.

Acts may be unconstitutional and yet not illegal.

How far did the process of change, out of which the existing ministerial system grew, actually advance during the reigns of William and Anne? William's first parliamentary ministry came into being when, under the advice of Sunderland, he attempted to bring the lower house into harmony with the crown through an arrangement which, for the first time in English history, enabled the executive to be represented in that body by a politically united group of its ministers, who, as representatives of the dominant party, constituted

Ministries of William and Anne.

A politically united group of dominant party.

Duty to
resign
office.

An interval
of anarchy.

Anne last
to exercise
veto power.

Her outcry
against
party gov-
ernment.

at the same moment the inner circle of the privy council. The Whig ministry thus formed, under the lead of Russell, Somers, Montagu, Wharton, and Shrewsbury, was able to sustain the king during the trial that followed the death of the queen at the end of 1694, and to hold Parliament at his side in the prosecution of the war until the Alliance succeeded in winning in 1695 its first great triumph over France through the capture of Namur. The quickness of perception that enabled the Junto to grasp the first principle of the new ministerial system by repelling as a unit all attacks upon any of its members was fully equaled by their inability to comprehend the second, involving their duty to resign office, when, through the elections that took place at the close of 1698, their political opponents won a majority of the House of Commons. "Thus at the beginning of 1699 there ceased to be a ministry; and years elapsed before the servants of the crown and the representatives of the people were again joined in a union as harmonious as that which had existed from the general election of 1695 to the general election of 1698. The anarchy lasted, with some short intervals of composedness, till the general election of 1705."¹ When Anne, who hated party government in every form as an enslavement of the crown, — whose personal influence she attempted to uphold by presiding to the last at every weekly meeting of the cabinet council,² and by exercising for the last time the veto³ power, — was forced to bow to the Whigs, whom she regarded as but little better than republicans, she declared in her letters to Godolphin, when the entry of Sunderland into the ministry had become inevitable, that "the appointment would be equivalent to throwing herself entirely into the hands of a party; that it was the object of her life to retain the faculty of appointing to her service honorable and useful men on

¹ Macaulay, ii. 709, 710.

² Campbell, *Chancellors*, iv. 287.

³ In 1707, when she rejected a Scotch militia bill. In 1693 and 1694 William III. had refused to assent to the Triennial Bill and Place Bill.

either side; that if she placed the direction of affairs exclusively in the hands of either Whigs or Tories, she would be entirely their slave, the quiet of her life would be at an end, and her sovereignty would be no more than a name.”¹ The death cry of the monarchy against the inevitable, as thus uttered by Anne, was a prophecy. The growth of the new cabinet system, retarded by unpropitious surroundings during the reigns of William and Anne, was suddenly stimulated at the accession of George I. by the advent of new conditions specially favorable to its development. Foremost among those conditions was the impersonality of the new sovereign, resulting from a willingness upon his part to surrender his right to rule into the hands of his constitutional advisers. So far from showing the bitter antagonism of William and Anne to such an arrangement, this foreign king, who could not speak the English language,² and who always regarded his English kingdom as an appendage to his Hanoverian electorate, was content to leave its entire management to an English cabinet while he devoted his personal energies to the promotion of his electoral interests. At the accession of the House of Hanover there was, for the first time since the Revolution, a simultaneous change of a whole ministry, and their replacement by another whose members took charge of all the principal offices of state.³ The Whig party which thus came into power under the leadership in the cabinet of Townshend, Stanhope, and Walpole was able, by virtue of its excellent organization, to perpetuate its rule for more than thirty years, supported as it was by a group of noble families, at whose head stood the Benticks, the Mannesers, the Cavendishes, the Russells, and the Grenvilles.

Cabinet system stimulated by accession of George I.

First simultaneous change of a whole ministry.

In the English constitutional system as it now exists the

¹ See Lecky, *History of England in the Eighteenth Century*, i. 224.

² As Walpole, his chief minister, could not speak French, the story goes that they conversed in Latin. Coxe, *Walpole*, i. 266; H. Walpole, *Works*, iv. 426.

³ See Torrens, *History of Cabinets*, vol. i., ch. i., entitled “The First Cabinet.”

Sovereignty now vested in the House of Commons.

Crown and legislature employ a common agent.

Three basic principles of parliamentary government.

supreme powers of the state are vested, not in theory but in fact, in the representative branch of the imperial Parliament, whose members under the provisions of recent reform bills are chosen by an electorate so broad as to embrace every element necessary for the full and free expression of the will of the people as a whole. The commands thus given by the nation to its rulers through the medium of this electoral system are executed by a committee chosen by the crown from the ranks of that party which for the moment commands a majority of the House of Commons. In order to secure perfect concord between the supreme legislative and executive powers, the committee that acts as the agent of the representative chamber is also made the agent of the crown by being intrusted with the offices that pertain to those who constitute the inner circle of the privy council known as the cabinet.¹ The primary object of this delicate and complex mechanism is to secure a perpetual accord between those who wield the executive power in the name of the crown and the electorate by which the members of the representative chamber are chosen. As a means to that end three basic principles have been gradually established in practice upon which parliamentary government in England now reposes. The first of these demands that the cabinet council shall be bound together as a unit through the possession of identical political principles held in common with a majority of the House of Commons; the second, that the moment that condition of things ceases to exist the cabinet shall resign as a whole; the third, that for the more convenient execution of the policy approved by the representative chamber, the headship of the cabinet shall be vested in a single person known as prime minister. If the several parts that enter into the structure

¹ "A cabinet is a combining committee, — a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state. In its origin it belongs to the one, in its functions it belongs to the other." Bagehot, *The English Constitution*, p. 14.

of this subtle mechanism had been created by the conscious action of the state embodied in charters, orders in council, or parliamentary statutes, the method to be pursued by those who attempt to draw out its history would be at once obvious and easy. But the fact is that the cabinet system as it now exists is the gradual and unpremeditated outcome of the progressive history of the nation as it has unfolded itself since the Revolution of 1688; it is the product of the growth of that set of tacit understandings generally known as the conventional constitution, which has developed alongside of the written code since that time. As it is true, then, that the wonderful thing to be described was not made but grew, nothing more can be attempted than a detailed statement of the successive stages through which it grew. For convenience, the entire period of growth, which began with the Revolution and paused rather than ended with the last reform bill, may be broken into two distinct epochs that should be clearly distinguished from each other. As a matter of historical fact, the three fundamental principles already defined regulating the relations of the cabinet to the crown on the one hand, and to the House of Commons on the other, came into being long before the house itself was made a really representative body, and as such a true exponent of the nation's will. The first epoch, therefore, in the growth of the modern ministerial system — coextensive with the reigns of George I. and George II. — is that during which the three vital principles defining the functions of the cabinet were so firmly settled in practice as to enable them to resist all subsequent efforts to overthrow them. During the twenty years that followed the breaking of the South Sea Bubble in 1721 Walpole so dominated the action of the cabinet and so impressed his personal will upon his party as to become the first prime minister,¹ in the modern

Cabinet system unpremeditated outcome of progressive history.

Two distinct epochs of growth.

¹ As first lord of the treasury, with Townshend at his side as secretary of state. Torrens, *History of Cabinets*, i. 298, 299. Carlyle tells us: "He had one

Walpole
first prime
minister in
modern
sense.

Forced to
resign by
adverse
vote, a
minister in
conflict
with major-
ity of col-
leagues.

George
III.'s as-
sault upon
cabinet
system.

"The king's
friends."

sense of that term, as distinguished from those royal favorites under the prerogative system of government whose rise and fall depended upon the personal will of the king alone. Walpole was the first prime minister ever forced to resign by an adverse vote of the lower house.¹ Then followed the settlement of the principle in the case of Lord Granville in 1744, that it is the duty of a minister to resign when he is no longer in political harmony with the majority of his colleagues.² In the light of these facts it is possible to say that at the death of George II. "cabinet rule had been upon its trial for nearly half a century; and, despite many blemishes and errors, its superiority to the systems of government that had preceded it was tacitly accepted by the nation."³

The last attempt ever made to break down cabinet government was made by George III., who came to the throne stimulated by his mother's continual precept of "George, be king."⁴ In 1762 his hope was realized. The ministerial system the Whigs had been constructing for nearly fifty years was broken down, and its place supplied by a coterie of "the king's friends," under the leadership of Bute, who was not prime minister in the sense in which Walpole had been, but a mere court favorite or grand vizier, whose rise and fall depended solely upon the will of his master, and not upon that

rule, that stood in the place of many: To keep out of every business which it was possible for human wisdom to stave aside. 'What good will you get out of going into that? Parliamentary criticism, argument, and botheration! Leave well alone.' " *Life of Frederick of Prussia*, iii. 373, 374.

¹ The struggle for his overthrow began in 1741 with a motion made in the lords for an address praying the king "to dismiss Sir Robert Walpole from his presence and councils forever." Although defeated by a large majority, the motive for the assault was revealed by a protest entered on the journals by thirty-one peers, who declared that as "a sole, or even a first minister, is an officer unknown to the law of Britain, inconsistent with the constitution of this country, and destructive of liberty in any government whatsoever." *Parliamentary History*, ii. 1083, 1126, 1215.

² The king indicated to Granville his desire that he should resign office. *Bedford Correspondence*, i. 25-35.

³ Torrens, *History of Cabinets*, ii. 566.

⁴ Rockingham, *Memoirs*, i. 3.

of the House of Commons. So completely did George III. succeed in erasing from the mind of Englishmen the idea that the immature system of cabinet government was a permanent part of the constitution of their country, that the great contemporary expounder of the laws of England gives it no place in his Commentaries, which were first published in authoritative form in 1765. Blackstone does not mention the name of "cabinet" at all; and the same thing may be said of the work of De Lolme, *La Constitution de l'Angleterre*, first published at Amsterdam in 1771. Both of these famous writers, who put forth their views just before George III.'s destructive work had reached its consummation,¹ perfectly comprehended the history and structure of the privy council, but of its mysterious inner circle, unknown to the law, called the "cabinet," they seem to have known absolutely nothing. The practical statesmen who met at Philadelphia in 1787 to frame the present constitution of the United States, with the English original, so far as it could be applied, as their avowed model, manifested throughout the same unconsciousness of the existence of the cabinet system that characterized their scientific European contemporaries. The framers of the American constitution, in constructing the presidential office, had no conception of the shadowy kingship of to-day, which reigns but does not govern; "the figure they had before them was not a generalized English king nor an abstract constitutional monarch; it was no anticipation of Queen Victoria, but George III. himself whom they took for their model. Fifty years earlier or a hundred years later, the English king would have struck them in quite a different light."² But as William and Anne had failed, so George III. failed in his struggle against the inevitable. His conqueror was Pitt,

"Cabinet" mentioned neither by Blackstone nor De Lolme.

Presidential office in U. S., modeled after kingship of George III.

George III. conquered by Pitt.

¹ In 1780 it was that Mr. Dunning carried though the House of Commons his famous resolution affirming "that the influence of the crown has increased, is increasing, and ought to be diminished." Cobbett, *Parliamentary History*, xxi. 347.

² Maine, *Popular Government*, p. 212.

the prime minister of twenty-five, who had entered public life as a Whig, and who was lifted through the wreck of that party to a height of political authority which no other statesman had been able to reach since the Revolution. If Pitt was forced to veil his absolutism as prime minister by an outward show of submission to the royal will, within the cabinet itself he so asserted his authority as to put beyond all question the fact that he was the real chief of state.¹ By finally establishing the paramount influence of the prime minister over his associates, Pitt was able to break down at last the bad system of government by means of separate and independent departments of state that had existed since the Revolution, simply because the ministers had never been forced to accept the supremacy of a common chief.² The foundations of such supremacy, laid down by Walpole, ripened under Pitt into a rule of government which, with perhaps two exceptions, has never been disputed since that time.

A real chief of state.

Destroyed system of independent departments.

Reform of representative system.

If, when Pitt resigned office in 1801, the House of Commons had been really an independent and representative body, parliamentary government as now understood in England would have been substantially complete. In theory the lower house was at that time both representative and independent, —in fact, it was both dependent and corrupt. The unreformed medieval representative system, which the nation had outgrown, had through the restriction of the franchise been made dependent upon an absurdly small number of electors who were in the main subject to the control of the crown and the aristocracy. The prolonged and bitter struggle, through which the nation has so reconstructed the popular chamber as to make it a truly representative body dependent upon the

¹ It is said to have been his custom briefly to discuss at cabinet meetings with Dundas such matters as they had not previously arranged, and then after communicating his decision to his colleagues they were told that they might go. Fitzmaurice, *Life of Lord Shelburne*, iii. 411.

² Todd, *Parliamentary Government*, i. 264, 265.

will of the people alone, rounds out the second epoch in the history of modern cabinet government, which, beginning with the reign of George III., ends for the moment with the last Reform Bill. The elder Pitt, who was the first to advocate reform, boldly denounced in the lower house in 1766 the borough representation as "the rotten part of our constitution. It cannot continue the century; if it does not drop, it must be amputated;"¹ and in 1770 he proposed that a third member should be added to every county, "in order to counterbalance the weight of corrupt and venal boroughs."² In 1774 appeared Lord Stanhope's pamphlets, which seem to have been the earliest publications in favor of reform; and in 1776 they were followed by the work of John Cartwright, whose second edition was entitled *The Legislative Rights of the Commonalty Vindicated*. In that year it was that John Wilkes introduced a comprehensive scheme of reform, embodying substantially all the principles that have been successfully advocated since that time. He moved for a bill, which was negatived without a division,³ to give additional members to Middlesex, Yorkshire, and other large counties, as well as to the metropolis; to disfranchise the rotten boroughs, and to add the electors to the county constituencies; and, finally, to enfranchise "rich, populous trading towns" like Manchester, Leeds, Sheffield, and Birmingham. In 1780, when the duke of Richmond, in the midst of the Lord George Gordon riots, presented a bill for the establishment of annual parliaments, equal electoral districts, and universal suffrage, the upper house set aside, without a division, a scheme then considered unworthy of serious consideration.⁴ Such was the prelude to the efforts in favor of reform made by the younger Pitt, who introduced in 1782 a motion for a committee to inquire into the state of the representation, prefaced by a

Elder Pitt's
efforts in
1766 and
1770.

Stanhope,
1774.

Cartwright,
1776.

Wilkes.

Richmond,
1780.

Younger
Pitt, 1782.

¹ Debates on the Address, January, 1766, Cobbett, *Parliamentary History*, xvi. 100; xvii. 223.

² Walpole, *Memoirs*, iv. 58.

³ *Parliamentary History*, xvii. 223, n.

⁴ *Ibid.* xxi. 686.

speech in which he denounced the nomination boroughs as "the strongholds of that corruption to which he attributed all the calamities of the nation," — an abuse that "had grown with the growth of England and strengthened with her strength, but had not diminished with her diminution nor decayed with her decay."¹ Although supported by Fox his attempt failed; and when in 1783 he renewed his efforts his resolutions were rejected by a vote of nearly two to one.² In 1785 he introduced his third and last scheme, which shared the same fate by the rejection of the motion to bring in the bill by a majority of seventy-four.³ Passing over the failure of Flood's plan in 1790; Grey and Erskine's attempt in 1792–1793; Grey's more comprehensive measure in 1797; Burdett's radical proposals in 1809; Bland's efforts in the next year, and Burdett's resolutions renewed in 1818–1819, we reach in 1820 Lord John Russell, who was destined to shape the great reform bill of 1832. He began to deal in a wise and temperate spirit with the crying evils of the representative system at a time when the task was rendered more difficult by reason of the extreme demands made, on the one hand, for universal suffrage, and by the unreasoning denials, on the other, of the necessity for any change whatsoever. Under such conditions his efforts made in 1821, 1823, 1826, 1828, and 1830 were unsuccessful. When at the close he reiterated, as a substitute for a more radical proposal from O'Connell, his own moderate ideas in favor of such a disfranchisement of the smaller boroughs as would make possible the enfranchisement of the great commercial towns, and the grant of additional representation to the more populous counties, without any increase in the total membership of the House of Commons, Wellington's ministry, which had so recently been forced to bow to other demands of O'Connell, resolved

Efforts of
Flood,
Grey, and
others.

Lord John
Russell
and reform.

His
defeats.

¹ Macaulay, "William Pitt," *Essays*, iii. 325.

² *Parliamentary History*, xxiii. 827; Stanhope, *Life of Pitt*, i. 118.

³ *Ibid.* xxv. 432–475.

to defeat both propositions. Peel, government leader in the lower house, declared that no reform was needed.¹ Under that blow both the resolutions of O'Connell and the amendment of Lord John went down; and thus the last word spoken at the close of the reign of George IV. seemed to settle the fact that the seventy years of agitation in favor of reform had ended at last in failure and disappointment. While the direct bribery of members had visibly declined, no change whatever had taken place for the better in the constitution of the popular chamber, excepting only the results brought about through Catholic emancipation. The system of rotten boroughs had neither "dropped" nor been "amputated"; the electoral basis had not been widened; and not a step had been taken to insure the redistribution of seats, so imperatively demanded by the shifting of wealth and population.

Peel's
declaration.

Cause
seemed to
be lost at
close of
reign of
George IV.

The dissolution² made necessary by the death of George IV. on the 26th of June, 1830, opened the way for new elections held just at the moment when the revolution that overthrew Charles X. in France, followed immediately as it was by another in Belgium, gave a fresh impulse to the liberal tendencies in England, which only a year before had enforced Catholic emancipation despite an obstinate resistance from the high Tories. When Wellington reiterated his opposition to reform upon the meeting of Parliament in October he was forced to resign office, thus ending the Tory ascendancy that had lasted for sixty years. Earl Grey, who now assumed office, with Brougham as lord chancellor, announced that the government would "take into immediate consideration the state of the representation, with a view to the correction of those defects which had been occasioned in it by the operation of time."³ To Lord John Russell was assigned the honorable

William
IV. and the
reform bill
of 1832.

Earl Grey's
first reform
bill, 1831.

¹ Upon the whole subject, see May, *Constitutional History*, i. 393-417.

² Parliament was dissolved July 24.

³ *Hans. Deb.*, 3d ser., i. 606.

duty of drafting the new measure presented March 1, 1831.¹ As all the world knows, the ministry was defeated and Parliament dissolved. After an appeal to the nation the second reform bill, passed by the commons September 21, was rejected by the lords. When the third reform bill had passed the commons in March, 1832, the attempt of the lords to defeat it aroused intense popular feeling and mob violence. When the king refused to create new peers the ministry resigned. Then it was that the lords accepted the king's suggestion and passed the bill which became 2 and 3 William IV., c. 45.² The primary object of the act was to equalize the representation by the withdrawal of a large number of seats from the rotten or nomination boroughs, which were distributed among the greater districts hitherto imperfectly represented or not represented at all. A hundred and forty-three seats were redistributed, fifty-six boroughs being completely disfranchised. The county representation was increased from ninety-four to one hundred and fifty-nine, while the county franchise was extended to leaseholders and tenant occupiers. In the boroughs, in order to extend the franchise to the whole of the municipal middle class, the right of voting was given as a uniform rule to all occupiers of houses, shops, or buildings of any kind, of the annual value of £10. The registration of electors was made a condition precedent to voting, with the provision that the polls should be closed after two days, a limit finally reduced to one day only.³ It has been estimated that by extensions of the franchise the total number of electors, reckoned at the passing of the reform bill of 1832 at

Second
rejected by
lords.

Third
reform bill
of 1832.

One hundred
and
forty-three
seats redistributed.
County
franchise.

Borough
franchise.

Registration.

¹ For the draft of the original plan, as submitted by Lord John in December, 1830, see his *Essay on the History of the English Government and Constitution*, pp. 226, 227.

² Cf. Roebuck, *History of the Whig Ministry*, ii. 334; Earl Grey, *Correspondence*, ii. 420, 444; May, *Constitutional History*, i. 144, 419-427. Sixteen peers were actually created to aid the measure, and it was understood that the king had consented to a further increase if necessary.

³ See the excellent summary in Lely and Foulkes, *Parl. Elec. and Reg. Acts*, pp. xxi-xxviii.

400,000, was about doubled;¹ and down to 1868, prior to the operation of the Reform Acts of 1867–1868, that total for all the counties and boroughs of the United Kingdom had not, according to the parliamentary returns, grown beyond 1,370,793. Only to that limited extent did the reform measure of 1832 rescue the representation from an oligarchy of peers and landowners and vest it in the hands of the middle classes. All acts upon the subject for the next thirty-five years were of minor importance. The Hyde Park riot of July 23, 1866, clearly indicated the presence of a new impulse in favor of reform, and the outcome was the Representation of the People Act, 1867, in which large concessions were made in favor of the working classes, both as to county and borough franchises, with less important changes in electoral areas. In 1868 that act was extended to Scotland by 31 and 32 Victoria, c. 48; and to Ireland by 31 and 32 Victoria, c. 49. After the acts thus extended were fully developed, they finally raised the electorate for the three kingdoms, including the universities, to a grand total of 3,183,552² (1885), as against 1,370,793, the highest product (1868) of the reform measure of 1832. In 1872 was passed the Ballot Act,³ by virtue of which the old method of voting was superseded, except as to the universities, by the new system requiring nominations in writing by ten registered electors, and a poll by secret voting taken by means of a ballot paper, to be marked by a single X by each elector. The moment the second reform bill was thus rounded out and completed by the Ballot Act of 1872, a fresh demand for a still further extension of the electoral system arose whose war cry was “equalization,” — equalization of the franchise in county and borough; equalization of the electoral areas by such a redistribution of seats as would

Representa-
tion of the
People
Act, 1867.

Ballot Act
of 1872.

Equali-
zation.

¹ The estimate of Dr. Gneist, *History of the English Constitution*, p. 722.

² Borough electors, 1,651,732; county electors, 966,719; 310,441 electors for Scotland; 224, 018 electors for Ireland, and 30,642 electors for the universities.

³ 35 and 36 Vict., c. 33.

Representa-
tion of the
People Act,
1884.
Redistribu-
tion of Seats
Act, 1885.

Member-
ship of
house not
materially
increased.

Increase in
numbers of
upper
house.

place the county and borough voter upon an equal plane as to representation. In 1884 the lords agreed to pass the Representation of the People Act, 1884,¹ upon the understanding that a Redistribution of Seats should be introduced in the lower house in 1885.² Thus the subject of electoral qualifications and that of electoral areas were dealt with in separate bills, and not jointly as in the acts of 1832 and 1867. In the Redistribution of Seats Act, which deals with the electoral areas of Scotland and Ireland, as well as with those of England, the effort was made so to reconstruct the electoral districts as to arrange them in divisions with substantially equal populations, each division to return one member only. It is a notable fact in the history of this revolution, carried on under constitutional forms, by which the electorate of the House of Commons was widened from about 400,000 voters in 1832 to 6,415,469 in 1896, that the membership of that house remained throughout substantially unchanged. Before the passing of the first reform bill, the representative chamber contained 658 members, and in 1885 it contained only 670. On the other hand, the notable fact in the history of the process through which the House of Lords has been developed into its present forms is that its membership, which at the accession of the House of Tudor numbered only 52 lay peers, has been so extended that in 1897 it embraced, all told, 567.³ But while the upper house has been thus increasing in numbers, it has been steadily decreasing in constitutional importance. When the resistance interposed by it to the passage of the reform bill of 1832 raised the question whether or no it is still a coördinate branch of the legislature, it was answered in the negative. The practical outcome of that conflict was that the House of Lords should continue

¹ 48 Vict., c. 3.

² 48 and 49 Vict., c. 23.

³ Five princes of the blood, 26 archbishops and bishops, 21 dukes, 22 marquesses, 117 earls, 27 viscounts, 305 barons, 16 Scottish and 28 Irish representative peers, exclusive of 15 minors.

under the tacit understanding that it will always bow to the will of the nation in the last resort, after that will has been clearly and finally expressed by the popular branch of the legislature. It has thus become a revising and suspending chamber, which can alter or reject bills on which the House of Commons is not yet thoroughly in earnest, upon which the nation is not yet determined.

A revising and suspending chamber.

Such, in brief, is the present condition of the vital organs of the English constitution, and such their relations to each other at the end of the ten centuries of unbroken development, which has adapted the primitive institutions of the Old-English commonwealth, without any break in their continuity, to the ever increasing wants of one of the most progressive and powerful of modern societies. As heretofore explained, the result of the Revolution of 1688 was to shift the center of gravity of the state from the crown to the popular branch of the legislature. The statesmen of the Revolution did little more, however, than establish irrevocably a political theory which their posterity have been able to press in our time to its ultimate and logical conclusion, — a conclusion which was not fully reached until the reform bills of the last sixty years widened the electorate of the House of Commons from about 400,000 in 1832 to nearly six millions and a half in 1897. From that electorate the popular chamber, that embodies and enforces the new principle of sovereignty to which the Revolution gave birth, draws its authority. The mighty transformation thus brought about in the internal mechanism of the constitution has been effected with the least possible change in its outward forms. As Bagehot has happily expressed it, this "ancient and ever altering constitution is like an old man who still wears with attached fondness clothes in the fashion of his youth; what you see of him is still the same; what you do not see is wholly altered."¹ That pro-

Summary of growth of modern ministerial system.

Center of gravity of state shifted by Revolution of 1688.

New principle of sovereignty vested in electorate.

¹ *The English Constitution*, p. 2.

Change concealed beneath ancient forms.

Work of George III.

Doctrine of "checks and balances."

Two conceptions contrasted.

found change thus concealed beneath ancient forms is embodied in the practical effect finally given to the results of the Revolution, by virtue of the arrangement under which the representative chamber now administers the royal authority through a committee of its own members called the cabinet. The outcome of the first efforts made to establish such an arrangement during the reigns of William III., Anne, and the first two Georges was so unsubstantial that George III., during the first ten years of his reign, was able to efface it almost entirely. So completely was he successful that when the members of the federal convention that met in Philadelphia in 1787 took the executive as then existing in the English constitution for their model, the present cabinet system did not exist either in theory or in fact. That it did not then exist in theory is put beyond all question by the contemporary works of Blackstone, De Lolme, Paley, and others, who, without even referring to the existence of the cabinet, formulated a doctrine of "checks and balances" absolutely incompatible with it; that it did not then exist in fact is equally certain because at that time the king himself and not the prime minister was the real executive. It was, therefore, held by the doctrinaires at that moment that the supreme sovereignty was vested in a balanced union of three elements, — democratic, aristocratic, and monarchical; that without the concurrence on equal terms of kings, lords, and commons, sovereignty could not be properly exercised. The corner-stones of the theory as thus expounded were, first, that the king had the exclusive right to exercise the entire executive authority through ministers appointed by himself and responsible to him alone; second, that the legislative authority was divided between king, lords, and commons as coördinate powers. Only by contrasting that conception of the constitution with that which exists to-day can we estimate the immense change that has actually taken place during the intervening period. The

existing ministerial system was so completely in eclipse a century ago that it could not be perceived even by the most acute observers; to-day it is the central figure in the picture, the great driving wheel that moves the entire constitutional machinery. The indirect source of its power is the electorate; the direct, the House of Commons, which is no longer looked upon as a coördinate department, but as a corporate entity in which the supreme sovereignty is vested. Upon the one hand stands the crown, with all its prerogatives vested in a committee of its members; on the other, the House of Lords as a mere revising chamber to counsel against the making of rash and ill-advised decrees, to which it must always bow in the last instance. Thus the old literary theory of "checks and balances," based upon the idea of a coördination between separate and coequal powers, has completely broken down in the presence of the incontestable fact that the English constitution now embodies "the close union, the nearly complete fusion, of the executive and legislative powers. No doubt, by the traditional theory as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authority, but in truth its merit consists in their singular approximation. The connecting link is *the cabinet*. By that new word we mean a committee of the legislative body selected to be the executive body."¹ As that committee draws its authority from an electorate so broad as to be removed only by a single step from manhood suffrage, it may now be safely assumed that the cycle has come round; that the gradual and silent process of change has been fully worked out through which the medieval monarchy has been finally transformed into the hereditary republic in which, under the ancient and still useful forms of the throne and the regalia, the English people is king.

Old literary theory of coördination has yielded to accomplished facts.

Medieval monarchy transformed into an hereditary republic

¹ Bagehot, pp. 10, 11.

CHAPTER V

ENGLISH LAW IN THE UNITED STATES

Effects of
physiog-
raphy on
state build-
ing in
Great
Britain and
the United
States.

1. The physiography of the island world in which the English kingdom arose determined the most important fact in its political history. By the narrowness of the limits of that island world the primitive kingdoms, loosely united for a time in the confederacies composing the heptarchy, were crowded together into a single consolidated state. The group of English colonies, as they appear upon our Atlantic seaboard toward the close of the eighteenth century, were a substantial reproduction of that older group of heptarchic commonwealths, as they appear in Britain in the tenth. And yet, despite that likeness, the younger group in their efforts at union were unable to look to the elder group for light or guidance, for the reason that the widely different geographical conditions by which they were respectively surrounded had prescribed for each a widely different destiny. Confined within the narrow and impassable bounds of an island world, it became the manifest destiny of the English states in Britain, advancing in the path of political aggregation, to coalesce in the formation of a single consolidated kingdom. Situated on the shores of an almost boundless continent, it became the manifest destiny of the English states in America, advancing in the path of political confederation, to unite in the flexible bonds of a federal system capable of unlimited expansion. Just as physical environment impelled the English kingdoms in Britain naturally and necessarily to coalesce in the shape of a con-

solidated kingdom in the tenth century, so did the same cause prompt the English commonwealths in America naturally and necessarily to coalesce in the shape of a federal commonwealth in the eighteenth.

2. In the sketch heretofore drawn of the growth of the English kingdom the conclusion was reached that out of a union of townships grew what was finally known in England as the hundred; out of a union of hundreds grew the modern shire; out of the union of modern shires grew the consolidated kingdom. The most important facts involved in that process of state building are that the Teutonic conquerors of Britain accomplished the work of conquest in small companies, and that, in obedience to race instinct, they grouped themselves together in townships out of whose union arose the larger aggregates. The power to subdue and settle a new country, and then to build up a state by that process of aggregation, constitutes the strength of the English nation as a colonizing nation. By that process, capable under favorable geographical conditions of unlimited expansion, has been built up the federal republic of the United States. "In America . . . it may be said that the township was organized before the county, the county before the state, the state before the Union."¹ In the effort to recreate the process through which the English colonies in America were formed, we must keep steadily in view the process through which their prototype in Britain was formed. The elements of organization in both were the same, and the general principles upon which such elements coalesced were substantially the same. It may be stated as a general rule

The typical
English
state in
America.

Strength of
English
nation as a
colonizing
nation.

¹ Tocqueville, *Democracy in America*, i. 49. "Upon the township was formed the county, composed of several towns similarly organized; the state, composed of several counties, and, finally, the United States, composed of several states; each organization a body politic, with definite governing powers in a subordinate series." Address of Mr. Lewis H. Morgan before American Association for the Advancement of Science, Boston, August 26, 1880.

Process of
aggregation
in the
United
States.

that the English colony in America, like the English state in Britain, represented an aggregation of counties, and that each county represented an aggregation of townships. The hundred, the intermediate division, appeared in some of the colonies, but being unnecessary to the local wants of the new land, passed out of view.¹ In some instances the colony was formed by the coalescence of the local communities before the charter was granted; in others the charter was granted first, and the colony then subdivided into districts as the local communities were organized. The fruit of both processes was the same, — a dependent state subdivided into counties and townships as the organs of local administration. In the northern colonies, where population became dense, and where the active spirit of the English yeoman and trader reproduced a system of political life as closely organized as it was vigorous, the township became the active agent of local administration because its compact organization was better adapted than that of the shire to the local wants of New England. In the southern colonies, where population was more sparse, and where the southern planter reproduced the more tranquil life of the English gentleman, who had little or nothing to do with the life of towns, the county became the active organ of local administration, satisfying as it did all of the political wants of a rural population.² The soil upon which the English colonies in America were planted was granted to them as *terra regis* by the English crown; it was not granted as folkland by the English Parliament. The charters under which the colonial govern-

Township
as the
active
local unit.

County as
the active
unit.

¹ The hundred existed in Virginia and in Maryland, and maybe elsewhere. As to its history in Virginia, see "Local Institutions of Virginia," Ingle, in *Johns Hopkins Studies*, 3d series, ii-iii. 41. "A tything man in each manor, a constable in each hundred." Bacon, *Laws of Maryland*, 1638.

² Edward A. Freeman, writing to the author on this subject, said: "I found in Virginia people spoke of the *county* just as they do here. In New England the county seemed lost. There the *town* was the thing when the *city* had not swallowed it up."

ments were organized were likewise royal grants; they were not concessions from the English legislature. In contemplation of English law the group of colonial governments in America created or confirmed by royal charters were mere corporations created by the king, and subject like all others of their kind to his visitatorial powers, and to the power of his courts to dissolve them in a proper case presented for that purpose.¹ Until some cause of forfeiture arose the grant, as between the crown and the patentees, was irrevocable, it being the settled doctrine of English law that after a grant of corporate powers made by the crown had been once accepted, the crown could not resume the grant without the consent of those in whom the privileges had been vested.² The irrevocable rights thus acquired by the colonists as against the crown were revocable, however, at the hands of the Parliament. Subject to the illimitable power of the Imperial Parliament, the English crown organized upon the soil of the New World a group of colonial governments whose differences of internal organization and whose greater or less dependence upon the crown distinguished them broadly from each other. Those colonies to which the crown gave most sparingly the right to regulate their own affairs are generally known as royal colonies, — a typical representative of which may be found in the colony of Virginia, whose early constitutional growth happily illustrates the process of evolution through which the most dependent of the English settlements in America was rapidly transformed from a servile corporation into a self-governing state organized upon the model of the English kingdom. In the same sense in which Virginia stands as the typical representative of the royal colonies, Massachusetts stands as the

Colonies
mere cor-
porations
created by
the crown.

Royal
colonies —
Virginia.

¹ The charter of Massachusetts was canceled in 1684 by the crown judges in a proceeding begun by *scire facias* (Palfrey, *New England*, iii. 391-393); that of Virginia, by a legal judgment rendered in 1624.

² Cf. Dillon, *Municipal Corporations*, i. 109, 2d ed., and cases cited.

Charter
colonies —
Massachu-
setts.

Proprie-
tary system
— Mary-
land.

Founda-
tion of
colonial
fabric
English
law.

typical representative of the opposite class,—consisting of Massachusetts, Rhode Island, and Connecticut,—generally known as the charter colonies, despite the fact that their foundations were laid without the aid or sanction of charters at all.¹ Between the royal and charter governments stood a middle class known as proprietary, which approached nearer to the latter than the former in respect to their freedom from royal control. The proprietary system, which grew out of the idea that the work of colonization could be better done by private individuals than by corporate enterprise, rested upon a series of grants made by the crown to one or more proprietors of vast tracts of land coupled with an almost unlimited power of government and legislation. The first proprietary government that bore fruit was that of Maryland, whose constitutional history begins with the grant made in 1632 to the first Lord Baltimore. "The Province was made a county palatine, and the Proprietary was invested with all the royal rights, privileges, and prerogatives, which had ever been enjoyed by any Bishop of Durham within his county palatine."² The foundation of the entire fabric was English law. In the original charter it was provided "that all and every the persons, being our subjects which shall go and inhabit within the said colony and plantation, and every their children and posterity, which shall happen to be born within any of the limits thereof, shall have and

¹ Tocqueville has well said that "in general, charters were not given to the colonies of New England till their existence had become an established fact. Plymouth, Providence, New Haven, Connecticut, and Rhode Island were formed without the help and almost without the knowledge of the mother country." *Democracy in America*, i. 45. Connecticut has been graphically described as "a state which was born, not made." See "The Genesis of the New England State," Johnston, *Johns Hopkins Studies*, 1st series, xi. 6.

² *Narrative and Critical History*, iii. 520. There were manors in Maryland, and courts baron and courts leet were held there. See Taylor, *The Origin and Growth of the English Constitution*, i. 32-33. As to Carolina and Locke's Fundamental Constitutions, see for the first draft, *Carroll*, ii. 361; for the later modifications, *Shaftesbury Papers* for the years under which they were issued.

enjoy all liberties, franchises, and immunities of free denizens and natural subjects within any of our other dominions, to all intents and purposes as if they had been abiding and born within this our realm of England, or in any other of our dominions.”¹ The heart of North America, which passed to the English crown by right of discovery, was granted to the two trading companies created by the charter of 1606, as any royal manor might have been granted. The granting clause of the charter is, “To be holden of us, our heirs and successors, as our manor of East-Greenwich, in free and common socage, and not in capite.” The fact that the soil upon which the English colonies in America were planted came to them through royal grants, the fact that every form of political organization established thereon rested on royal charters were the foundation stones upon which the colonies gradually built up, in the light of their actual experience, their theory of the political relations that bound them to the mother country. Their rights as Englishmen endowed with “all liberties, franchises, and immunities of free denizens and natural subjects” flowed from their charters, which, as between themselves and the crown, were irrevocable through not non-forfeitable contracts. The earliest form of direct legislative control to which any of the colonies were subjected in the form of ordinances or instructions for their government emanated, not from the law-making power of the king in Parliament, but from the ordaining power of the king in council. Losing sight of the fact that England had grown into an empire since the work of colonization began, the colonists clung to the earlier conception which regarded the home Parliament simply as the legislative organ of the United Kingdom. As such they held it had no right to invade the jurisdictions of their colonial assemblies in order to legislate directly upon their internal concerns. Out of

Heart of
North
America
granted as
if it were
a royal
manor.

American
theory of
colonial
rights.

Ordaining
power of
king in
council.

¹ *Charters and Constitutions*, pt. ii., p. 1891.

Conflict
between
English and
colonial
theories.

the conflict that finally arose between English and colonial theories as to the practical omnipotence of the Imperial Parliament over self-governing communities beyond the four seas, grew the war of the Revolution, and the severance of the colonies from the mother country.

Colonies
transformed
into sover-
eign states.

When the tie of political dependence that bound the colonies to the mother country was severed,¹ the English provinces in America rose to the full stature of sovereign states. "When the Revolution took place the people of each state became themselves sovereign."² And as soon as they "took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the Parliament became immediately and rightfully vested in the state."³ On the 10th of May, 1776, the Continental Congress recommended to the several conventions and assemblies of the colonies the establishment of independent governments "for maintenance of internal peace and the defense of their lives, liberties, and properties."⁴ Before the end of the year in which the recommendation was made, by far the greater part of the colonies had adopted written constitutions in which were restated in a dogmatic form all of the seminal principles of the English constitutional system. Thus ended that marvelous process of growth through which the English colonies in America were rapidly developed into a group of independent commonwealths in which each individual member was, in its organic structure, a substantial reproduction of the English kingdom.⁵ With the adoption of the written constitutions of 1776, the typical English state in America reached its

Substantial
reproduc-
tions of
English
kingdom.

¹ Turgot said: "Colonies are like fruits, which cling to the tree only till they ripen. As soon as America can take care of itself it will do what Carthage did." *Oeuvres de M. Turgot*, Paris, 1808-1811, ii. 19, 66.

² C. J. Taney, in *Martin v. The Lessee of Waddell*, 16 Peters, 410.

³ *Ibid.* 416.

⁴ See *Charters and Constitutions*, i. 3.

⁵ I can here say with Professor Seeley, "By England I mean solely the state or political community which has its seat in England." *The Expansion of England*, p. 7.

full growth. When the offspring is compared with the parent, when the English state in America is compared with the English state in Britain, the resemblance is too close for the relationship to escape the most careless observer. In both the political substructure is the same, — the ancient Teutonic system of local, self-governing communities composed of the township, the hundred, and the shire. In each, municipal organization rests upon substantially the same foundation. So far as central organization is concerned, every American state is a mere reproduction of the central organization of the English kingdom with such modifications as have necessarily resulted from the abolition of nobility, feudality, and kingship. In the new as in the old the central powers of the state are divided into the three departments, — legislative, executive, and judicial, — which, in the same qualified sense, are separate and distinct from each other.¹ So far as the legislative department is concerned, the English bicameral system everywhere reappeared.² Our houses of representatives are nothing but the House of Commons over again, while our state senates represent the House of Lords with the elective principle substituted in lieu of hereditary right.³ "The governor of the independent state succeeded the governor of the dependent colony, and he, whether elected or nominated, was essentially a reflected image of kingship. The governor of the state retained the position of the governor of the colony, with such changes as a Republican system necessarily required."⁴ So far as judicial organization is concerned, there has been but a slight departure from the ancient original. Such differences as do

Substructure the same.

Central organization.

Division of powers.

Legislative organs.

Judicial organization.

¹ See *Federalist*, no. xlvi., Dawson's ed., pp. 334-342. The maxim was accepted in the qualified sense in which it was understood by Montesquieu. *Spirit of Laws*, bk. xi., ch. 6. See also Paul Janet, *Histoire de la Science Politique*.

² At the outset Pennsylvania and Georgia were exceptions.

³ The ordinary judicial powers of the House of Lords were everywhere cut off, except in New York, where the senate was made a supreme court of appeal.

⁴ Freeman, *History of the Federal Government*, i. 314, note 1.

exist are rather differences of detail than of organic structure. In both systems the unit of local judicial administration is the county where all causes, except equity and probate causes, are tried in the first instance according to the course of English customary law, subject to review in a central appellate court modeled after the great courts at Westminster. In America as in England the ancient county court is overshadowed by the assize or circuit court held periodically in every county by the itinerant or circuit judge sent to preside in the local tribunals by state authority. In every assize or circuit court held where English law prevails, the jury of presentment and the trial jury enter as component parts into the structure of a tribunal which, in its modern form, is the special possession of the English race. The colonies started out by adopting the entire body of English law, so far as its principles could be adapted to their social and political conditions, including admiralty law. Upon the establishment of colonial governments "it was deemed proper to invest the governors with the same civil and maritime jurisdiction; and therefore it became usual for the lord high admiral or the lords commissioners to grant a commission of vice admiral to them."¹ When the first Continental Congress of 1774 claimed to be entitled to the benefit, not only of the common law of England, but of such of the English statutes as existed at the time of the colonization, and which they had by experience found to be applicable to their several local and other circumstances, they simply declared the basic principle of English law that English subjects going to a new and uninhabited country carry with them, as their birthright, the laws of England existing when the colonization takes place. And here let the fact be emphasized that what the colonists carried with

English
jury
system.

Admiralty
jurisdiction.

English law
as a
birthright.

¹ Stewart, V.-Ad. 394, 405. See opinion of Mr. Justice Campbell in *Jackson v. Steamboat Magnolia*, 20 Howard 329-330.

them was the entire body of English law, a composite consisting of five elements: (1) customary or common law; (2) equity law; (3) canon law; (4) admiralty law; (5) statute law. Vexatious confusion has arisen out of the attempt to describe that composite by the use of the term "common law," which should be applied only to one of the five elements composing English law. The fact that three of those five elements are of strictly Roman origin, coupled with the further fact that a fourth, the common law, has drawn a mass of its most important principles from the same source, should certainly suggest the question whether English private law can be said to be a distinct and indigenous system with a character all its own. The contention is repeated here that that quality belongs to English public law only. English law, public and private, continued in force in all the states that became sovereign in 1776, each state declaring for itself the date from which it would recognize it. The constitution of New York, of 1777, declared that such parts of the common law of England, and of the statute law of England and Great Britain, as, together with the acts of the colonial legislature, formed the law of the colony on the 19th of April, 1775, should continue to be the law of the state. The common and statute laws of England, prior to the fourth year of James I., and of a general nature were adopted by the convention of Virginia, in 1776 and in 1795 and in 1805 by the government of Ohio. In many of the states all statutes and acts of the English Parliament passed prior to the fourth year of James I. are declared to be a part of the law of the state, while it may be stated, as a general rule, that English statutes passed before the emigration of our ancestors, in aid or amendment of the common law, applicable to our condition, and not repugnant to our institutions and form¹ of govern-

A composite
of five
elements.

English law
continued in
force in all
the states
from cer-
tain dates.

¹ *Patterson v. Winn*, 5 Peters 233; *Sackett v. Sackett*, 8 Pick. 309; *Bogardus v. Trinity Church*, 4 Paige 198; *The Heirs of Girard v. The City of Philadelphia*, 4 Rawle 333. See also *Kent, Com.*, 12th ed. (Holmes), i. 645 sq.

English
decisions
authorita-
tive.

ment, constitute a part of what is usually called our common law. In the same way English decisions rendered prior to the war of the Revolution form a part of the common law of the United States and are binding on American courts. On the other hand, it is equally well settled that English decisions rendered since that time are not authoritative, only persuasive. By the Kentucky act of 1807 the reading of such decisions made since July 4, 1776, was expressly forbidden.¹

Constitutional
limitations
an
American
invention.

3. It has ever been an elementary principle of American constitutional law that every state legislature is endowed by its very nature with the omnipotence of the English Parliament, save so far as that omnipotence is restrained by express constitutional limitations.² That invention embodies the fundamental difference that divides two kindred political systems, the one resting on the sovereignty of the people as expressed in written constitutions, the other on the sovereignty of Parliament. Such limitations, of which the European world knew nothing, grew naturally out of the process through which American legislatures came into existence. From the very beginning the powers of the colonial assemblies were more or less limited through the terms of the charters by which such assemblies were either created or recognized. Even in colonial times "questions sometimes arose . . . whether the statutes made by these assemblies were in excess of the powers conferred by the charter; and if the statutes were found in excess, they were held invalid by the courts, — that is to say, in the first instance, by the

Their
origin in
colonial
charters.

¹ In *Hickman v. Boffman*, decided in 1808, by the Kentucky Court of Appeals, and reported in *Hardin's Reports*, 356, the Chief Justice stopped Mr. Clay when he offered to read from 3 *East's Reports*, 199, 200, stating that it was a violation of the act of the last assembly. And yet the two great streams of American and English law are still flowing on side by side in two distinct channels.

² See Cooley, *Constitutional Limitations*, p. 107 and cases cited; *Mangan v. State*, 76 Ala. 60; *Davis v. State*, 68 Ala. 58.

colonial courts, or, if the matter was carried to England, by the Privy Council.”¹ The colonial charter embodied a system of government established by a superior authority, creating a subordinate law-making body that could do everything except violate the terms and transcend the powers of the instrument to which it owed its existence. So long as the colony remained under the English crown, the superior authority which could amend or remake the system of government was the English crown or Parliament. When the tie binding the colonies to the mother country was severed, that authority passed over, not to the state legislature, which remained limited, as it always had been, but to the people of the independent commonwealth, whose will speaks through what is now the state constitution, just as the will of the crown or Parliament had spoken through the charters of 1628 and 1691. While, as a general rule, the colonies, after being transformed into independent states, adopted new constitutions, the charter granted to Connecticut in 1662 was continued as her organic law until 1818; and that granted to Rhode Island in 1663 was continued as her organic law until 1842.² It is worthy of note that one of the first cases, if not the very first, in which a legislative enactment was declared unconstitutional and void, on the ground of conflict with the constitution of a state, was decided under the charter last named. In *Trevett v. Weeden*, decided in Rhode Island in 1786, an act was declared void because it impaired the right of trial by jury guaranteed by the colonial charter. In the case of *Bayard v. Singleton*,³ which came before the supreme court of North Carolina in November, 1787, an act passed in 1785, authorizing summary proceedings in suits concerning confiscated property, was declared void because

Charters of
Connecticut
and Rhode
Island.

Power to
declare a
legislative
act void.

¹ Bryce, *The American Commonwealth*, i. 243, 415.

² *Charters and Constitutions*, pt. i., p. 252; pt. ii., p. 1603.

³ Martin (N.C.), p. 48.

destructive of the right of trial by jury. In *Holmes v. Walton*, cited in 9 N.J.L. 444, an act was declared void which provided for trials by juries consisting of six men.¹ But what is far more important is the fact that this novel and supreme power of declaring an act of the legislature void was assumed by the state courts, as a judge-made law, without a line or word of authority on the subject in the state constitutions. The state judges simply reasoned out the right on abstract principles. As an illustration, reference may be made to the words of Wythe, J., who, in the case of *Com. v. Caton*,² said: "Nay, more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say to them, Here is the limit of your authority; and hither shall you go, but no farther." When the new system of limitations, thus developed in the states, was lifted into a higher sphere through its application to the legislative power vested in the unique federal republic created by the constitution of 1787, the inevitable outcome was the Supreme Court of the United States, the only court in history that has ever assumed the right to pass on the validity of a national law. As there is no line or word in the federal constitution intimating directly the existence of such a right, it was there reasoned out, as in the states, as a matter of judge-made law. Not until thirteen years after the organization of the Supreme Court was the first attempt made, in the case of *Marbury v. Madison*³ (1803), to put the stamp of nullity upon a national law; and not until twenty years after its organization was the first attempt made, in the case of *Fletcher v. Peck*⁴ (1810), to put

Judge-
made law.

No express
authority in
federal
constitution
to declare
an act void.

¹ For a more extended statement of the cases, see Taylor, *Jurisdiction and Procedure of the Supreme Court of the United States*, pp. 2-5.

² 4 Call (Va.) 5-21.

³ 1 Cranch 137.

⁴ 6 Cranch 87.

the stamp of nullity upon a state law, — in both instances by reason of repugnancy to the federal constitution. The earnestness with which both conclusions were resisted forced the court, speaking through Marshall, C.J., to vindicate by argument its authority to assert them. In the first case it said: "The question whether an act repugnant to the constitution can become a law of the land is a question deeply interesting to the United States; but happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established to decide it. . . . The powers of the legislature are defined and limited; and, that those limits may not be mistaken or forgotten, the constitution is written." And in the second: "The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state." Thus, by means of judicial logic, and not by the authority of an express constitutional provision, was the Supreme Court of the United States able to maintain its right to put the stamp of nullity upon a law, state or federal.

Marshall's arguments in support of the right.

From the days of the Greek Leagues down to the making of the second constitution of the United States, all federal governments had been constructed on a single plan at once clumsy and inefficient. The most perfect of the Greek Leagues was the Achaian, of which the framers really knew nothing as we learn from Madison, who tells us in the *Federalist*¹ that "could the interior structure and regular operation of the Achaian League be ascertained, it is probable that more light might be thrown by it on the science of federal government than by any like experiments with which we are acquainted." The coveted knowledge was not accessible because the historical scholars who have since passed beyond

A federal government acting directly on the citizen an American invention.

History of Greek federalism a closed book in 1787.

¹ No. xviii.

the Greece of Thucydides into the Greece of Polybios, who have passed beyond the period in which the independent city-commonwealth was the dominant political idea into the later and less brilliant period of Hellenic freedom occupied by the history of Greek federalism, had not then completed their investigations, only fully worked out in very recent years.¹ Such scanty knowledge as the framers did possess of Greek federalism seems to have been chiefly drawn from the little work of the Abbé Mably, *Observations sur l'Histoire de Grèce*.² The only federal governments with whose internal organizations the builders of our federal republic were really familiar, and whose histories had any practical effect upon their work, were those that had grown up between the Low-Dutch communities at the mouth of the Rhine, and between the High-Dutch communities in the mountains of Switzerland, and upon the plains of Germany.³

Teutonic
federations.

Down to the making of the second constitution of the United States, the Confederation of Swiss Cantons, the United Provinces of the Netherlands, and the German Confederation really represented the total advance made by the modern world in the structure of federal governments. Such advance was embodied in the idea of a federal system made up of a union of states, cities, or districts, representatives from which composed a single federal assembly whose limited powers could be brought to bear, not upon individual citizens, but only upon cities or states as such. The fundamental principle upon which all such fabrics rested was the requisition system, under which the federal assembly was only endowed with the power to make requisitions for men and money upon the states or cities composing the league for federal purposes, while the states, alone, in their corporate

Requisition
system.

¹ The first volume ("History of Greek Federations") of Edward A. Freeman's great *History of Federal Government* was not published until 1863.

² *Federalist*, No. xviii.

³ *Ibid.* nos. xix., xx.

capacity possessed the power to execute them. The initial effort of the English colonies in America along the path of federal union ended with the making of the first constitution of the United States embodied in the Articles of Confederation. Up to that point nothing new had been achieved; the fruit of the first effort was simply a confederation, constructed upon a plan over two thousand years old, which could only deal through the requisition system with states as states. That confederation possessed no power (1) to operate directly upon the individual citizen; (2) it had no independent power of taxation; (3) the federal head was not divided into three departments, executive, legislative, and judicial; (4) the federal assembly consisted of one chamber instead of two. The lack of power to levy and collect for itself federal or national taxes rendered our first federal government preëminently a failure as a financial system, dependent as it was upon the will of thirteen independent legislatures.

Impotence
of Articles
of Con-
federation.

All the world understands in a vague and general way that certain path-breaking principles entered into the structure of our second federal constitution of 1789 which differentiate it from all other systems of federal government that have preceded it. M. de Tocqueville gave formal expression to that understanding when he said: "This Constitution, which may at first be confounded with federal constitutions that have preceded it, rests in truth upon a *wholly novel theory which may be considered a great discovery in modern political science*. In the confederations that preceded the American Constitution of 1789, the allied states, for a common object, agreed to obey the injunctions of a federal government; but they reserved to themselves the right of ordaining and enforcing the execution of the laws of the Union. The American States, which combined in 1789, agreed that the federal government should not only dictate, but should execute, its

The unique
creation
of 1789.

Tocqueville.

own enactments. In both cases the right is the same, but the exercise of the right is different; and this difference produced the most momentous consequences.”¹ Mr. Gladstone simply reiterated that idea when he said: “As the British Constitution is the most subtile organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man.” That master of the history of English institutions perfectly understood that as our state constitutions are mere reproductions, mere evolutions from the English political system, so our second federal constitution is a new invention “struck off at a given time by the brain and purpose of man.” That invention of a new type of federal government, embodying, as Tocqueville said, “a wholly novel theory,” is so unique that it can no more be confounded with any preceding federal government than a modern mogul engine can be confounded with an ancient stagecoach. Did that wonderful invention, which has produced such momentous consequences, have a personal author, like all other inventions; or was it revealed at the same moment, and in some mysterious way, to a large number of persons, thinking and acting in isolation? Upon that humanly impossible or miraculous theory historians of our existing Constitution have attempted to explain the origin of the unique and prearranged plan of federal government presented to the Convention which sat at Philadelphia during the one hundred and twenty-five days that intervened between May 14 and September 17, 1787. After deducting recesses and holidays there could not have been more than ninety working days. No one has ever contended, or can ever contend, that the great invention in question was made *after the Convention met*, for the simple and conclusive reason that it was the basis of all the “plans” save one, carefully

“A wholly
novel
theory.”

¹ *Democracy in America*, i. 198, 199.

constructed beforehand, out of which the Constitution was evolved. Five and only five "plans," all prearranged, were submitted to the Convention, viz., the Virginia plan, the Charles Pinckney plan, the Connecticut plan, the Alexander Hamilton plan, and the New Jersey plan. As the last only proposed a revision of the Articles of Confederation it may be dismissed from consideration. There were but four plans in which proposals for a new system of federal government were embodied, each resting upon the "wholly novel theory" which has produced "the most momentous consequences."

Basis of
four plans
submitted
to Con-
vention of 1787.

A distinguished specialist has well said that "the Virginia plan became the bedrock of the Constitution."¹ That plan, which embodied perfectly every phase of the great invention, was drafted by Madison, who began his preparation for the labors of the Convention at least a year before it met.² In December, 1786, we find him in active correspondence with Jefferson, then at Paris, as to the Virginia plan.³ The marvel is that the historians who are supposed to have explored the sources have never taken the pains to ask this simple and inevitable question, — *From what common source did the draftsmen of the four plans draw the path-breaking invention which was the foundation of all of them?* Let it be said to the honor of those draftsmen that no one of them ever claimed to be the author of that invention. Neither Madison, nor Charles Pinckney, nor Sherman, nor Ellsworth, nor Hamilton, nor any of their biographers, so far as the author is informed, ever set up such a claim in behalf of any one of them. The answer to "the simple and inevitable question" just propounded is this: The common source from which the

Were they
drawn
from a
common
source?

¹ Meigs, *The Growth of the Constitution in the Federal Convention of 1787*, p. 17.

² See Rives, *Life and Times of Madison*, ii. 208, "Preparations of Madison for Labors of Federal Convention."

³ See letter of Jefferson to Madison of December 16, 1786, in *Jefferson's Correspondence*, by T. J. Randolph, ii. 64, 65.

Pelatih
Webster's
invention,
February
16, 1783.

draftsmen of the four plans drew the path-breaking invention underlying them all was "A Dissertation on the Political Union and Constitution of the Thirteen United States of North America," published at Philadelphia by Pelatiah Webster, February 16, 1783, and there republished by him with copious notes in 1791, and herein reproduced for the first time after the lapse of one hundred and sixteen years. In that immortal paper, whose lightest words are weighty, he gave to the world, as *his personal contribution to the science of government, and as an entirety worked out in great detail* the "wholly novel theory" of federal government upon which reposes the existing Constitution of the United States.

Therein he propounded to the world, as "the original thoughts of a private individual, dictated by the nature of the subject only," the four novel and basic principles upon which our existing Constitution now reposes.

1. The principle of a Federal Government operating directly on the individual, instead of upon the States as corporations.

2. The division of a Federal Government into three departments, — legislative, executive, and judicial.

3. The division of a Federal Legislature into two chambers on the bicameral plan.

4. A Federal Government with delegated powers, the residuum of power remaining in the States.

His account
of it.

Prior to the date in question no single element of that theory had ever been propounded by any one. In a note appended to the republication of 1791 the great inventor gives the following account of the circumstances under which the invention was made: "At the time when this Dissertation was written (February 16, 1783) the defects and insufficiency of the Old Federal Constitution was universally felt and acknowledged; it was manifest, not only that the internal police, justice, security, and peace of the States could never be preserved under it, but the finances and public credit would necessarily be-

come so embarrassed, precarious, and void of support, that no public movement, which depended on the revenue, could be managed with any effectual certainty: but tho' the public mind was under full conviction of all these mischiefs, and was contemplating a remedy, YET THE PUBLIC IDEAS WERE NOT AT ALL CONCENTRATED, MUCH LESS ARRANGED, INTO ANY NEW SYSTEM OR FORM OF GOVERNMENT, which would obviate these evils. Under these circumstances, I offered this Dissertation to the public: how far the principles of it were adopted or rejected in the New Constitution, which was four years afterwards (September 17, 1787) formed by the General Convention, and since ratified by all the States, is obvious to every one."

At the same time he added: "I was fully of opinion (tho' the sentiment at that time would not very well bear) that it would be ten times easier *to form a new Constitution than to mend the old one.*¹ I therefore sat myself down to sketch out the *leading principles of that political Constitution*, which I thought necessary to the *preservation and happiness* of the United States of America, which are comprised in this Dissertation. I hope the reader will please to consider, that these are the original thoughts of a private individual, dictated by the nature of the subject only, long before the important theme became the great object of discussion, in the most dignified and important assembly which ever sat or decided in America." The great inventor perfectly understood the merits of his own case which he thus stated with the lucidity of a Greek and the terseness of a Roman. As early as 1781 Pelatiah Webster was the first to propose to the people of the United States, in one of his financial essays published at Philadelphia in May of that year, the calling of "a Continental Convention" for the making of a new con-

"Easier to form a new constitution than to mend the old one."

First to propose the calling of a convention.

¹ The italics in all the quotations from Pelatiah Webster's paper are his own.

stitution.¹ In bearing testimony to that fact Madison said that Pelatiah Webster, "after discussing the fiscal system of the United States, and suggesting, among other remedial provisions, one including a national bank, remarks that the authority of Congress is very inadequate to the performance of their duties; and this indicates the necessity of their calling a *Continental Convention* for the express purpose of ascertaining, defining, enlarging, and limiting, the duties and powers of their Constitution."² Two years after he had thus sounded the tocsin for the states to assemble, he made the invention and published to the world, in detail, the plan upon which the Constitution was to be formed. While the historian Bancroft³ failed to appreciate the stupendous importance of his work, he frankly admits that he actually performed it when he says: "The public mind was ripening for a transition from a confederation to a real government. Just at this time Pelatiah Webster, a graduate of Yale College, in a dissertation published at Philadelphia, proposed for the legislature of the United States *a congress of two houses* which should have ample authority for making laws 'of general necessity and utility,' and enforcing them as well on individuals as on States. He further suggested not only heads of executive departments, but judges of law and chancery. The tract awakened so much attention that it was reprinted in Hartford, and called forth a reply."⁴ In both of the scanty and stingy biographical notices of him in the leading American encyclopedias, the statement is made

Bancroft's
admission.

¹ The fact that "Alexander Hamilton made the same suggestion in a private letter to James Duane, September 3, 1780," is of no importance. It was not a public act, not even a public declaration. See Gaillard Hunt, *Life of James Madison*, p. 108.

² *The Madison Papers* (1841), ii. 706-707. Bancroft contends that Madison was mistaken in attributing this pamphlet of 1781 to Pelatiah Webster. He thinks its author was William Barton. See *History of the Constitution of the United States*, i. 24 and note 3.

³ *History of the Constitution of the United States*, i. 86.

⁴ It was replied to anonymously by Roger Sherman.

that his plan "is mentioned by James Madison as having an influence in directing the public mind to the necessity of a better form of government." Pelatiah Webster needs the admissions neither of Madison nor Bancroft to establish his title to the authorship of the "wholly novel theory" now embodied in the Constitution of the United States, because that title rests upon contemporary documentary evidence as clear and convincing as that upon which rests Jefferson's title to the authorship of the Declaration of Independence. If that be true, then he has made a larger personal contribution to the science of government than any other one individual in the history of mankind. Among our nation builders he stands second to Washington alone. And yet among them all he only has been neglected and forgotten by his countrymen, not through any conscious omission, but because of a careless historical scholarship which has failed to present his great achievement in its true light.

Madison's
admission.

The most scientific writer upon finance during the Revolutionary War was Pelatiah Webster, whose essays on that subject fill a volume.¹ He was born at Lebanon, Connecticut, in 1725, and graduated at Yale College in 1746. In 1755 he removed to Philadelphia, where he became a prosperous merchant, and in due time an ardent supporter of the patriot cause in the War of the Revolution, aiding with pen and purse. He was captured by the British, and on account of his ardor was imprisoned for four months. As early as October, 1776, he began to write on the currency, and in 1779 he commenced the publication at Philadelphia of a series of "Essays on Free Trade and Finance." He was sufficiently important as a political economist to be consulted by the Continental Congress as to the resources of the country. His financial studies soon convinced him that

Pelatiah
Webster
as a writer
on finance.

Financial
studies
prelude to
invention.

¹ The second edition of 1791 was "Printed and sold by Joseph Cruikshank, No. 91 High Street, Philadelphia."

no stable fiscal system could be established until the then existing federal government was wiped out and superseded by one endowed with independent taxing power. Therefore, as early as 1781, in one of his financial essays, he made the first public call for the "Continental Convention," referred to by Madison, to be armed with power to devise an adequate system of federal government. Having thus taken the first step, he set himself to work to formulate in advance such an adequate system as the Convention should adopt, whenever it might meet. In the great tract published at Philadelphia, February 16, 1783, we have photographed for us the workings of his mind as he moved along paths never trod before. He sounded the keynote when he declared: "They (the supreme power) *must therefore of necessity be vested with a power of taxation*. I know this is a most important and weighty truth, a dreadful engine of oppression, tyranny, and injury, when ill used; yet, *from the necessity of the case*, it must be admitted.

The
supreme
power of
taxation.

"For to give a supreme authority a power of making *contracts*, without any power of *payment* — of appointing *officers*, civil and military, without money to *pay* them; power to *build ships*, without *any money* to do it with; a power of *emitting money*, without any power to *redeem* it; or of *borrowing* money without any power to make payment, etc. — such solecisms in government are so nugatory and absurd, that I really think to offer further argument on the subject would be to insult the understanding of my readers. To make all these payments dependent on the votes of *thirteen popular assemblies*, who will undertake to judge of the propriety of every contract and every occasion of money, and *grant* or *withhold* supplies according to their opinion, whilst at the same time the operations of the whole may be stopped by the vote of a single one of them, is absurd." Thus Pelatiah Webster proposed the existing system of federal taxation,

then entirely new, to the world; thus he proposed that the ancient system of requisitions, resting on the taxing power of the states, should be superseded by a system of federal or national taxation extending to every citizen, directly or indirectly. Instead of the lifeless system of absurdity embodied in the Articles of Confederation, he proposed to substitute a self-executing and self-sustaining national system, based on the following propositions, stated in his own language: "*The supreme authority of any State must have power enough to effect the ends of its appointment, otherwise these ends cannot be answered and effectually secured. . . . I begin with my first and great principle, viz., That the Constitution must vest powers in every department sufficient to secure and make effectual the ends of it. The supreme authority must have the power of making war and peace — of appointing armies and navies — of appointing officers both civil and military — of making contracts — of emitting, coining, and borrowing money — of regulating trade — of making treaties with foreign powers — of establishing post offices — and, in short, of doing everything which the well-being of the Commonwealth may require, and which is not compatible to any particular State, all of which require money, and cannot possibly be made effectual without it. . . . This tax can be laid by the supreme authority much more conveniently than by the particular Assemblies, and would in no case be subject to their repeals or modifications; and of course the public credit would never be dependent on, or liable to bankruptcy by the humors of any particular assembly. . . . The delegates which are to form that august body, which are to hold and exercise the supreme authority, ought to be appointed by the States in any manner they please.*" In formulating his conclusions as to the supremacy of federal law acting directly on all citizens, he said: "(1) *No laws of any State whatever, which do not carry in them a force which*

Adequate power to be vested in each department.

Supremacy of federal law.

extends to their effectual and final execution, can afford a certain or sufficient security to the subject — this is too plain to need proof; (2) laws or ordinances of any kind (especially of august bodies of high dignity and consequence), which fail of execution, are much worse than none; they weaken the government; expose it to contempt. . . . A government which is but half executed, or whose operations may all be stopped by a single vote, is the most dangerous of all institutions. . . . Further I propose that if the execution of any act or order of the supreme authority shall be opposed by force in any of the States (which God forbid!), it shall be lawful for Congress to send into such State a sufficient force to suppress it. On the whole, I take it that the very existence and use of our union effectually depends on the full energy and final effect of the laws made to support it; and therefore I sacrifice all other considerations to this energy and effect, and if our Union is not worth this purchase we must give it up — the nature of the thing does not admit any other alternative.” In these ringing terms was announced the path-breaking invention of a supreme and self-executing federal government operating directly upon the citizen; an invention for which the world had been waiting for two thousand years; *an invention of which no trace or hint is to be found in the Constitutions of any of the Teutonic Leagues, in the Articles of Confederation, or in the prior utterance of any other American.*

A supreme
and self-
executing
federal
govern-
ment.

A strictly
organized
govern-
ment.

Having thus defined his fundamental concept of a federal government operating directly on the citizen, the great one boldly accepted the inevitable corollary that such a government must be strictly organized and equipped with machinery adequate to its ends, — with the usual branches, executive, legislative, and judicial; with its army, its navy, its civil service, and all the usual apparatus of a government, all bearing directly upon every citizen of the Union without any reference to the government of the several states. No

such federal government, ancient or modern, had ever existed. As Montesquieu was the first to point out, the division of state powers into executive, legislative, and judicial originated in that single state in Britain we call England.¹ From that single state the principle passed into the single states of the American Union.² Pelatiah Webster was the first to conceive of the application of the principle of the division of powers to a *federal state*; he was the first to propose that the *federal head* should be divided and then organized as the particular ones are into legislative, executive, and judicial. More than three years later Jefferson indorsed that idea by commending it to Madison.³ Having thus made his second great invention, Webster proceeded to explain how the three departments, executive, legislative, and judicial, should be organized. His idea was that the executive power should be vested in a council of ministers to be grouped around a president elected by Congress. On that subject he said: "These *ministers* will of course have the best information, and most perfect knowledge, of the state of the Nation, as far as it relates to their several departments, and will of course be able to give the *best information* to Congress, in what manner any bill proposed will affect the public interest in their several departments, which will nearly comprehend the whole. The *Financier* manages the whole subject of the *revenues* and *expenditures*; the *Secretary of State* takes knowledge of the general *policy* and *internal government*; the *Minister of War* presides in the whole business of *war* and *defense*; and the *Minister of Foreign Affairs* regards the whole state of the nation, as it stands related to, or connected with, all foreign powers. . . . I would further propose, that the aforesaid *great ministers of state* shall compose a *Council of State*, to whose number Congress

Division of powers in a federal state.

Organization of the executive power.

¹ *Spirit of Laws*, bk. xi., ch. 6.

² *Federalist*, no. xlvii.

³ In the letter written from Paris, December 16, 1786, heretofore cited.

A bicameral
federal
legislature.

may add three others, viz., one from *New England*, one from the *Middle States*, and one from the *Southern States*, one of which to be appointed *President by Congress*." To the organization of the legislative department Webster gave elaborate consideration. Just as no prior federal government had ever been divided into three departments, so no prior federal legislature had ever been divided into two houses. The one-chamber body represented by the Continental Congress was the type of every other federal assembly that had ever preceded it. As stated heretofore, the path-breaker, looking to the English bicameral system as it had appeared in the several states, proposed "that the *Congress shall consist of two chambers, an upper and lower house, or senate and commons, with the concurrence of both necessary to every act; and that every State send one or more delegates to each house: this will subject every act to two discussions before two distinct chambers of men equally qualified for the debate, equally masters of the subject, and of equal authority in the decision.*" Citizens of the United States, to whom such a division now seems a matter of course, should remember that when Webster proposed it, it was an unprecedented novelty in the history of the world, so far as *federal* legislatures were concerned. After an elaborate discussion of the qualifications of members of Congress, in which he sharply assailed the then existing rule forbidding their reelection, he proceeded to define a part of the original jurisdiction of the Supreme Court of the United States by saying "that the supreme authority should be vested with powers to *terminate and finally decide controversies arising between different States.*" He also said, "To these I would add *judges of law and chancery.*" Thus the entire federal judicial system was distinctly outlined. Above all he was careful to define the reserved powers of the states. On that subject he said: "I propose further, that the powers of Congress, and all the

Judicial or-
ganization.

other departments acting under them, shall all be *restricted to such matters only of general necessity and utility* to all the States, as cannot come *within the jurisdiction* of any particular State, or to which the *authority* of any particular State is not *competent*: so that each particular State shall enjoy all sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress, for the purposes of the general union." In that passage we have the first draft, and a very complete one, of the Tenth Amendment.¹ So it is a matter of documentary evidence that every element that entered into the "wholly novel theory, which may be considered a great discovery in modern political science," and which differentiates our second federal constitution of 1789 from every other that preceded it, was *the deliberate invention of Pelatiah Webster*, who announced to the world that theory, *as an entirety*, in his epoch-making paper of February 16, 1783. Prior to that date no federal government had ever existed (1) that operated directly on the individual citizen; (2) no federal government had ever been divided into three departments, executive, legislative, and judicial; (3) no federal legislature had ever been divided into an upper and lower house. There is no record, there is not even a claim that, prior to that date, any human being had ever propounded any one of those principles in connection with a federal government. The great inventor was so conscious at the time of the magnitude of his undertaking that he exclaimed as he wrote: "May *Almighty wisdom direct my pen* in this arduous discussion." In conclusion he said: "This vast subject lies with mighty weight on my mind, and I have bestowed on it my utmost attention, and here offer the public the best

Reserved
powers of
the states.

Three path-
breaking
ideas.

Inventor
conscious
of magni-
tude of
under-
taking.

¹ It provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

thoughts and sentiments I am master of. . . . I have not the vanity to imagine that my sentiments may be adopted; I shall have all the reward I wish or expect, if my Dissertation shall throw any light on the great subject, shall excite an emulation of inquiry, and animate some abler genius to form a plan of greater perfection, less objectionable, and more useful." In his republication of 1791 he described perfectly the circumstances under which the great invention of February 16, 1783, was made, when he said that "the public ideas were not at all concentrated, much less arranged into any new system or form of government, which would obviate these evils. Under these circumstances I offered this Dissertation to the public." In that Dissertation, Pelatiah Webster presented, as a free gift to the great country that has neglected and forgotten him, the "new system or form of government" which passed, *through the four "plans"*¹ *offered in the Federal Convention of 1787*, into the existing Constitution of the United States. Certainly no more "wonderful work was ever struck off at a given time by the brain and purpose of man." The outcome of that work was a novel and unique creation operating directly on the people, and not upon the states as corporations. The state governments are not subject to the central government. The people are subject to both governments. The new creation is in no respect federal in its *operation*, although it is in some respects federal in its *organization*. No one of the three basic principles constituting the great invention was seriously questioned in the Convention. Its mighty and immortal

Four
"plans"
mere
conduits.

¹ At a later time a grave controversy arose as to "*the singularly minute coincidences between the draft of a federal government communicated by Mr. Charles Pinckney of South Carolina to Mr. Adams, Secretary of State, the Virginia plan, and the Constitution as finally adopted. Every explanation was given of "the singularly minute coincidences," except the plain and obvious one, — all four plans out of which the Constitution arose were taken from a common source.*" For a statement of the controversy in question see Rives, *Life and Times of Madison*, ii. 353-357.

task involved only their adaptation to very difficult and complex political conditions. The inventor of the plan stands to the members of the Convention as an architect stands to master builders.

As an evidence of the highly practical temper of Pelatiah Webster the fact should be mentioned that, having been a successful merchant, his pet hobby seems to have been to create a department of commerce in close touch with Congress. He said: "I therefore humbly propose, if the merchants in the several States are disposed to send delegates from their body, to meet and attend the sitting of Congress, that they shall be permitted to form a *chamber of commerce*, and *their advice* to Congress be *demande*d and *admitted* concerning all bills before Congress, as far as the same may affect the *trade of the States*." In his criticisms made in 1791 of the work of the Federal Convention he said that its failure to accept that suggestion was a great mistake. The very recent creation of a department of commerce and labor has at last effectuated his idea. Only through the vista of receding years can such an epoch-making mind be viewed in all its grandeur. What signifies a century of neglect passed in the midst of the "momentous consequences" his mighty work has wrought! His time is at hand; his fame is as safe and as certain as the immortality of thought and the unerring justice of the tribunal of history. His abiding faith in the justice of that tribunal he clearly expressed when he said: "But if any of these questions should in future time become objects of discussion, neither the *vast dignity of the Convention*, nor the *low unnoticed state of myself*, will be at all considered in the debates; the *merits* of the matter, and *the interests connected with or arising out of it* will alone dictate the decision." The humanly impossible and miraculous theory which has heretofore serenely assumed that the greatest and most unique of all political inventions

A department of commerce proposed.

Webster's faith in the tribunal of history.

No invention without an inventor.

had no inventor, cannot survive a method of historical investigation that undertakes to demonstrate that beneath every shell there is an animal, behind every document there is a man. The eminent French critic and historian Ch. V. Langlais has said: "History is studied from documents. Documents are the traces which have been left by the thoughts and actions of men of former times. There is no substitute for documents: no documents, no history." Strange indeed it is that the most important document connected with the constitutional history of the United States should now be presented to the jurists and statesmen of the world as if it were a papyrus from Egypt or Herculaneum. The author is grateful for the good fortune that has enabled him to unearth this great document, and to place it, for the first time, in its true light.¹

The new national citizenship.

Origin of interstate citizenship.

4. The one particular in which the first confederation rose above the older Teutonic Leagues, after which it was patterned, was embodied in the new principle of interstate citizenship it originated. That principle infused itself neither into the constitution of the old German Empire, nor of Switzerland, nor of Holland.² Section one of Article four of the Articles of Confederation provided that, "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states." The substance of that provision was reproduced in Section two of Article four of the present Constitution, which provides

¹ In order to make it more accessible it has been printed as an Appendix. The Senate of the United States has just printed, in a very handsome form, 1000 copies for the use of its members, while a Committee of the House of Representatives has recommended the printing of 2000 copies for the use of its members.

² Bancroft, *History of the Constitution*, i. 118.

that, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Beyond that point the framers of the more perfect union were not prepared to go. They did not attempt to do more than establish an interstate citizenship to which they imparted the qualities of uniformity and equality by denying to every state the right to discriminate in favor of its own citizens as against those of any other state.¹ In the absence of any positive assertion by federal authority of any such thing as a primary citizenship of the United States as such, there was really no substantial basis upon which to maintain its existence. If any such thing as a federal or national citizenship existed at all, it was nothing more than a secondary and dependent relation. The better view is that prior to the adoption of the Fourteenth Amendment a man was a citizen of the United States only by virtue of his citizenship in one of the states composing the Union. In the famous case of *Dred Scott*² it was held that no state had the power to raise a man of African descent to the rank of a citizen so as to make him a citizen of a state or of the United States. The Constitution of the United States never reached its logical completion until after the adoption of the Fourteenth Amendment. As heretofore pointed out, the new principle which became the basis of the more perfect union, and which imparted to it its distinctive character, was that the sum of federal power vested in the new constitution should operate not upon states in their corporate capacity, but directly upon individuals. If that principle had been carried, at the time of its adoption, to its logical conclusion, it would then have been settled that the individuals upon whom the new gov-

The form it assumed in constitution of 1789.

No primary federal citizenship prior to Fourteenth Amendment.

¹ "That the Constitution itself has defined citizenship of the United States by declaring what persons, born within the several states, shall or shall not be citizens of the United States will not be pretended. It contains no such declaration." Mr. Justice Curtis in *Dred Scott v. Sandford*, 19 How. 575.

² *Dred Scott v. Sandford*, 19 How. 393.

ernment was to act should be primarily its own citizens. No greater solecism can be imagined than a federal government acting directly on citizens, and yet a government without citizens.

While there can be no doubt that the leading motive that led to the adoption of the Fourteenth Amendment was to reverse the results of the Dred Scott Case, and to secure the right of citizenship to the African race, the fact remains that the first section of the amendment, without making any direct reference to the question of race at all, contains the first positive definition ever given to citizenship of the United States as a primary and substantive thing, independent of state citizenship. That section provides that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Roscoe Conkling, a leading member of the Reconstruction Committee that framed the amendment, produced for the first time the journal of the committee on the argument of the San Mateo County Case, December 19, 1882. In his argument he said: "At the time the Fourteenth Amendment was ratified, as the records of the two Houses will show, individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating state and local taxes."¹ Thus it appears that, at the critical moment, citizens of the state of New York, claiming federal protection for their property interests against hostile state

First
defined
therein.

Journal of
committee
produced in
San Mateo
Case.

¹ See Guthrie, *The Fourteenth Amendment to the Constitution of the United States*, pp. 24-25.

legislation, joined with those who were seeking to protect the freshly emancipated from the same danger. Prior to that time the Constitution guaranteed no adequate protection to life, liberty, or property as against such legislation. Except in the case of bills of attainder or laws impairing the obligation of contracts, the arbitrary exercise by local legislatures, courts, or executive officers of powers affecting life, liberty, or property could not be checked or redressed by the federal judiciary.¹ The prohibition against *ex post facto* laws referred to criminal cases only.² The only provisions of the original constitution protecting fundamental rights in the states were those entitling the citizens of each state to all the privileges and immunities of citizens in the several states, and guaranteeing a republican form of government in every state.³ The provisions of the Bill of Rights embodied in the first ten amendments restrain the national government only, and were not intended to apply to the states.⁴ To remedy that condition of things, it became necessary to nationalize the entire system by creating a national citizenship as the primary citizenship. By the "due process of law" limitation, the new national citizenship was placed under the direct protection of that chapter of Magna Carta which provides that "no freeman shall be taken or impressed, or disseized, or outlawed, or exiled, or anywise destroyed; nor will we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land." In the course of time the sacred text of that fundamental statute came to be understood in England as the living guarantee of all the rights which good government should require and enforce, a con-

Lack of
guarantees
against
state
action.

Restraints
upon
national
action.

"Due
process of
law" and
Magna
Carta.

¹ Cf. Mr. Justice Field's concurring opinion in *Bartemeyer v. Iowa*, 18 Wall. 129, 140.

² *Calder v. Bull*, 3 Dall. 386, 390, 396, 399; *in re Sawyer*, 124 U.S. 200, 219. As to what constitutes an *ex post facto* law, see *Thompson v. Utah*, 170 U.S. 343.

³ *Forsyth v. Hammond*, 166 U.S. 506, 519.

⁴ *Barron v. Baltimore*, 7 Pet. 243, 247; *McElvaine v. Brush*, 142 U.S. 155, 158.

As interpreted by
Coke and
his fol-
lowers,

and by
Supreme
Court of
United
States.

ception that naturally varied from age to age. That conception, in the liberal form given it by Coke and his followers, during the constitutional struggles with the Stuarts,¹ was transplanted by the founders of the English colonies on our Atlantic seaboard, where it became the original basis of American constitutional law. In construing the first section of the Fourteenth Amendment the Supreme Court has said: "The prohibition against depriving the citizen or subject of his life, liberty, or property, without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the XIVth Amendment, in the year 1866. The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown."²

Equal
protection
of the laws.

And yet broad and comprehensive as the ancient formula contained in the Great Charter was, the framers of the Fourteenth Amendment found it too narrow for their purposes. They felt obliged to supplement it by a new American invention which provides, "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."³ Thus it was that new as well as ancient elements entered into this epoch-making section which has shifted the center of gravity of the Constitution from the individual states to the nation as a whole. In the corporate person of the nation it has vested the self-executing power to preserve itself in every part, and to protect its citizens from all possible oppressions arising out of the unjust or unequal application of state laws or authority.

¹ Cf. McGehee, *Due Process of Law*, pp. 3-7.

² *Davidson v. New Orleans*, 96 U.S. 97.

³ *Yick Wo v. Hopkins*, 118 U.S. 356, 369.

In the famous case of the *United States v. Wong Kim Ark*,¹ the question arose whether a child born in the United States, of parents of Chinese descent, who at the time of his birth were subjects of the emperor of China, but had a permanent domicile in the United States, and were there carrying on business, and were not employed in any diplomatic or official capacity under the emperor of China, became at the time of his birth a citizen of the United States under Section one of the Fourteenth Amendment. The Court was thus called upon to answer this vital question: Was this child of Chinese parents, at the time of his birth, "subject to the jurisdiction of the United States"? Its answer was that, "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." 124 U.S. 478. II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith,' or 'power,' of the king. The principle embraced all persons born within the king's allegiance and subject to his protection. . . . This fundamental principle, with these qualifications or explanations of it, was clearly, though quaintly, stated in the leading case, known as Calvin's Case, or the Case of the *Postnati*, decided in 1608."² Thus it appears that an English rule, which was the outcome of the connection in feudalism between the individual and the soil on which he lived, a rule embodying the allegiance due from liegemen to their liege lord, was so interpolated into a vital part of the Constitution of the United States as to confer at least inchoate citizenship upon all children born to foreign parents permanently domiciled at the time upon American soil, despite the fact that such parents are still the subjects of a foreign state. So com-

Children
born on
American
soil of
foreign
parents.

Constitu-
tion inter-
preted in
light of
English law.

Feudal
rule of
allegiance.

¹ 169 U.S. 649.

² 2 Howell's St. Tr. 559, 613-617, 639, 659, 679.

"Terms
of art."

pletely have the basic principles of English law, including its "terms of art,"¹ been incorporated into our entire political and legal fabric, state and federal, it may be said that while the grammar of our constitutional language has departed to a marked extent from the ancient original, its words, with their ancient signification, still abide with their force unimpaired.

¹ During the trial of Aaron Burr, when Chief Justice Marshall was called upon to define the phrase "levying war," he said: "It is a technical term. It is used in a very old statute of that country, whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, *particularly terms of art*, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning unless the contrary be proved by the context." *Burr's Trial*, ii. 401, 402. See to the same effect *Murray v. The Hoboken Land Co.*, 18 How. 272; *Smith v. Alabama*, 124 U.S. 465.

CHAPTER VI

ROMAN AND ENGLISH LAW COMBINED

1. In the chapter entitled "External History of Roman Law," an effort was made to emphasize the fact that the public law of Rome, constitutional and administrative, was rejected because inapplicable to the new conditions that arose when the state system of modern Europe, in which the state as the nation is the unit, swept away and superseded the ancient state system in which the city-commonwealth had been the unit. What did survive was the Roman private law of family and property, of contract and tort, based on principles of natural equity and universal reason which have not lost their force with the altered circumstances of more recent times. In the chapter entitled "External History of English Law," an effort was made to emphasize the fact that the public law of England, after a thousand years of insular development, is extending itself as the accepted political model, after which have been fashioned the many systems of popular government now existing throughout the world. Since the beginning of the French Revolution nearly all the states of Continental Europe have organized national assemblies after the model of the English Parliament in a spirit of conscious imitation. Through an unconscious process of natural reproduction the English political model has reappeared in North American constitutions, state and federal, whence it has passed, in its American form, into the constitutions of Mexico, Central and South America, with such modifications as have been suggested by local circum-

Survival of
Roman
private and
English
public law.

Adoption
of English
public law

in areas
preoccupied
by Roman
private law.

stances. By that extension of English public law, within less than a century, over the vast areas in Continental Europe and in Latin America preoccupied by Roman private law a startling result has been brought about. A new type of state has thus arisen whose outer shell, or constitutional law, is English, and whose inner code of private law is Roman. A typical illustration is to be found in the present constitution of the French Republic, whose political outer shell is more purely English than that of any American state, while its interior code of private law is Roman. Almost as striking an illustration is to be found in the blended law systems of the state of Louisiana. Upon such data was based the statement, made in the preface, that everything now points to the conclusion that out of a combination of English public law as the outer shell, with Roman private law as the interior code, is to arise the typical state law system of the future. A most inviting field for inquiry and speculation upon this all-important subject is to be found within the limits of the republics established in Mexico and Central and South America, to whose systems of law, public and private, this chapter is devoted.

Typical
law system
of the
future.

Reproduc-
tion of
Spanish
law in
America.

2. The sovereign was regarded from the outset as the fountain of all authority throughout Spanish America, and an almost regal and absolute power was vested by special grants from the king in the persons sent to found the first governments in the New World. The Casa de la Contratacion or India House at Seville,¹ established by an ordinance of 1503, with authority to grant licenses, to dispatch fleets, and to dispose of the results of trade and exploration, became subordinate to the Council of the Indies, created by Ferdinand in 1511 and fully organized by Charles V. in 1524. The royal laws gave to that Council supreme jurisdiction over

Council of
the Indies.

¹ In order to enable it to superintend more conveniently the shipping to America, the *Casa de la Contratacion* was transferred to Cadiz in 1717.

all the Western Indies pertaining to the Spanish crown which had been discovered at that period, or which might thereafter be discovered, — such jurisdiction extending over all their interests and affairs, with the power to make, with the royal assent, all laws and ordinances necessary for the welfare of the provinces. The Council of the Indies, which consisted of a president, who was the king, four secretaries, and twenty-two councilors, appointed all the officers employed in America in compliance with the nomination of the crown, and every one was responsible to it for his conduct. Prior to the revolution the Spanish possessions in America formed nine distinct governments, formed on the same plan and independent of each other.¹ Of these four were viceroyalties — Mexico, Peru, La Plata, and New Granada — and five captain-generalships — Yucatan, Guatemala, Chili, Venezuela, and the island of Cuba. The government of each was vested in a viceroy or captain general, who was held to represent the king. The principal courts of justice were the *audiencias reales* or royal audiences, composed, in addition to the president, who was the viceroy or captain general, of a regent, three judges, two *fiscales* or attorneys, a reporter, and *anal-quazil* or constable. After the royal audiences came the *cabildos*, whose members, consisting of *regidores* and other persons appointed by the king, and of two *alcaldes* annually elected by the *regidores* from among the people, constituted a municipal body in almost every town or village of importance. All men were not equal, however, before these tribunals, whose jurisdictions were narrowed by a system of *fueros* or privileges of corporate bodies and of the professions; of the clergy, called public or common; and of the monks, canons, inquisitions, colleges, and universities. The basis of

Provincial
organiza-
tion.

Courts of
justice.

Privileges
of corpora-
tions.

¹ The title of the Spanish crown to the American colonies was supposed to depend not so much on discovery and possession as on the bull of Pope Alexander VI., dividing the American continent between the kings of Spain and Portugal. Cf. Solorzano (*Política Indiana*, vol. i., chs. 10 and 11).

*Siete
Partidas*
the basis.

the entire fabric was Spanish law, in the form that law had assumed after its codification in the *Siete Partidas* which became fundamental in the colonies as in the mother country.¹

Upon that general basis law was administered, subject to such local regulations and decrees as were promulgated by the Council of the Indies, whose bungling and often corrupt legislation soon filled its records with masses of contradictory and useless laws. In order to improve that condition of things the various laws enacted in Spain for the government of the Indies, and promulgated at different times, in the form of *cédulas*, *decretos*, *resoluciones*, *ordenamientos*, *reglamentos*, *pragmáticas*, and the like were collected and digested by the order of Philip IV. and published in 1661 as the *Recopilación*

*Recopilación
de Leyes de
los Reynos
de las
Indias.*

de Leyes de los Reynos de las Indias. That compilation, a better digested edition of which was published by Charles II. in 1681, is regarded as the only authentic collection of the decrees and ordinances governing Spanish America prior to the year 1680. As it was designed only to regulate the political, ecclesiastic, and fiscal administration of the Spanish possessions in the New World, it did not pretend to be a complete code. As its various enactments do not contain provisions relating to the civil law, it is not strange that laws 1 and 2, title 1 of book 2, should provide that in cases where the *Recopilación de Indias* does not apply, the laws of Castile must be observed.² Thus the civil law of Spain became the basis of private law in Spanish America; and, as the legislation of the mother country was often inapplicable to colonial conditions, Philip IV. decreed³ that no law enacted in Spain

Supple-
mented by
laws of
Castile.

¹ "The Partidas are still worthy of careful study, since they are fundamental in the law of Spain and her colonies." Howe, *Studies in the Civil Law*, 2d ed., p. 142.

² After declaring the effect of the *Recopilación de Indias*, Law 1 provides: "y en lo que no estuviere decidido por las leyes de esta Recopilación para las decisiones de las causas y su determinacion, se guarden les leyes de la Recopilación y Partidas de estos Reynos de Castilla, conforme a la ley siguiente."

³ *Recopilación de Indias*, 1, 40, t. 1, b. 2.

should be obligatory in America unless accompanied by a cedula to that effect emanating from the Council of the Indies. Thus it may be stated, as a general rule, that when a case in the colonies did not fall within the provisions of the *Recopilación de Indias*, recourse was to be had to "*las leyes de la Recopilación y Partidas de estos Reynos de Castilla.*"

3. Reference should here be made to the vast territorial area, upward of 3,288,000 English square miles (not far short of the extent of Europe), occupied by Brazil, whose civil law was drawn from Portugal. When the prince regent, afterward Dom João VI., decided to take refuge in Brazil, where he arrived in 1808, for the first time a colony became the seat of government of its own mother country. In 1815 it was declared an independent kingdom subject to the crown of Portugal but entitled to its separate administration and its own laws. The revolutionary spirit pervading the Spanish colonies now found its way into Brazil, and produced an insurrection at Pernambuco in 1817, which was followed by a new impulse drawn from the constitutional systems suddenly introduced into Spain and Portugal in 1820. Before the promise that the constitution of Portugal should be extended to Brazil could be carried out, the old king sailed for Europe, leaving his son Dom Pedro to rule in his absence. In 1822 he was proclaimed emperor, and had his own title and the independence of Brazil acknowledged by his father three years later. A representative system was at the same time introduced. As the laws of the Portugals extended to all her dominions, the civil law of Brazil was drawn from that source. The Portuguese pride themselves on having had the first codification in modern Europe, as they claim to have had the most ancient of parliaments, the Cortes of Lamego in the heart of the Middle Ages (1144). That first codification was the *Ordenações* (Ordinances) *Affonsinas*, or of King Affonso V., upon which, under Dom John the First and Dom Duarte,

Reproduction of Portuguese law in Brazil.

Dom Pedro proclaimed in 1822.

Portuguese claim to first codification in modern Europe.

The
"Philippine
Code."

worked first the *Corregidor* João Mendes, and after him Dr. Ruy Fernandes. That first body of laws was transformed, under Dom Manoel, into the *Ordenações Manoelinas*, published in 1514; then, in 1603, under the Spanish domination, into the *Ordenações Philippinas*, or of Philip (second of Portugal and third of Spain). The "*Philippine Code*" was, however, very incomplete and deficient, and had to be supplemented by very many particular laws of all dates, called *extravagantes*. Even with such additions it did not cover the whole field of juridical relations enforced by immemorial custom and tradition, and a law of the 18th of August, 1769, called *da boa razão*, left to the courts practically the faculty of creating the law, according to their own judgment, as it recognized as "subsidiary legislation" to the *Ordenações* and to the other laws of the country, the "styles and practices" of Portuguese jurisprudence, the Roman law, and the laws of the civilized nations, bearing on the contested points.

Portuguese
law
fundamentally
Roman.

The Portuguese law is fundamentally Roman. As the country was civilized by the Romans, it retained the impress of that civilization. The chief inspiration of the old Portuguese jurists was therefore drawn from the *Institutes* and the *Pandects*. That influence remained undisturbed for centuries, and its greatest and last representative was the celebrated Dr. Paschoal José de Mello Freire, to whom Queen Mary the First committed, in 1783, the revision of books 2d and 5th of the *Ordenações do Reino* (Ordinances of the Kingdom). As his work, *Institutiones Juris Civilis Lusitani*, embodied the entire system of the Portuguese jurisprudence of his time, he deserves the name of its creator. His authority was almost absolute from his time until beyond the middle of the nineteenth century. But slowly the Roman influence began to lose the exclusive power it naturally exercised when the Portuguese jurists wrote in Latin. Under the law of 1769, which made the legislation of the civilized countries, as well as the Roman

law, *subsidiary*, in cases of doubt or omission, to the national laws and practice, the French commentators of the *Code Napoléon* began to supersede the Portuguese Romanists as the study of French superseded that of Latin. The evolution of jurisprudence was the same for a long time both in Portugal and in Brazil. The Portuguese laws in force at the time of the independence of Brazil were adopted as Brazilian law by an act of the Constituent Assembly of the 20th of October, 1823. While the old *Ordenações Philippinas* of 1603 gave place in Portugal, in the second part of the nineteenth century, to a Civil Code, the work of Viscount de Seabra, they remain until now, with changes made here and there by special laws and by enactments in harmony with the liberal institutions adopted by the country since 1822, the chief structure of civil law in Brazil. The Constitution of 1824 provided for the making of a Civil and a Penal Code. The Penal Code appeared in 1830, and the Commercial Code in 1850, but the Civil Code has not yet been promulgated. In 1855 was committed to a Brazilian jurist of the highest capacity, Senhor Teixeira de Freitas, the task of digesting the then existing laws of the country, and his work yet stands in lieu of the expected Code, although without the binding power of an act of the legislature. Its title is *Consolidação das Leis Civis*. He was afterwards intrusted with the preparation of the Civil Code. He drafted a full preliminary sketch of it, *Esboço de Código Civil*, from which much was taken for the Argentine Civil Code, — Dr. Velez Sarsfield, its author, acknowledging his obligation to the great Brazilian jurist. But a few years after Teixeira de Freitas repudiated his *Esboço*, and refused to continue the work under the plan of the contract. The consequence was that Senator Nabuco,¹

Portuguese Romanists superseded by French commentators.

Ordenações Philippinas of 1603 substructure of law in Brazil.

Penal Code of 1830 and Commercial Code of 1850.

Esboço de Código Civil a mere project.

Senator Nabuco.

¹ From his son, the famous diplomatist, jurist, and scholar, Mr. Joaquim Nabuco, now Brazilian ambassador at Washington, where he is beloved by all, the author has drawn the greater part of the data upon which is based the above sketch of Portuguese and Brazilian law.

another great jurist and chief of the Liberal party, under the Empire, received in 1872 the same commission, but died without being able to carry it out. Through diverse causes no one of the projects of a Code by other jurists, Felicio dos Santos, Coelho Rodrigues, and Clovis Bevilacqua, was adopted. The project of Senhor Bevilacqua may yet, however, become law. In Brazil as in Portugal the French influence succeeded that of the Roman Digest, and of late the influence of the German jurists has been considerable in the two principal law schools of Brazil, — those of Pernambuco and of São Paulo. Since the foundation of the republic in 1889, under the community of political institutions and of political jurisprudence, the civil law has been subordinated to the spirit of the political institutions. In Brazil the influence of the United States is already noticeable. The French influence upon her political system was manifest in the monarchical Constitution of 1824, as in it appeared a new political power, committed exclusively to the emperor, to control or to keep within their own spheres the three other powers, — executive, legislative, and judicial. That power, called the moderating power, *Poder Moderador*, was a conception of Benjamin Constant, the great French *publiciste* of the epoch. The North American influence was accentuated in the political law of Brazil as early as in 1834, when the act reforming the constitution, called *Acto Adicional*, converted the empire of Brazil, under certain limitations, into a federal nation. The present Constitution of the 24th of February, 1891, is in its political structure the same as that of its prototype.

German
influence in
Brazilian
law
schools.

Constant
and the
*Poder
Moderador*.

Severance
of Spanish
colonies
from
mother
state.

4. The United States of North America, colonized a century later than Spanish America, learned to take care of themselves so far in advance of their southern neighbors as to be able to establish systems of governments, state and federal, as standards for their imitation. Spain's colonial system, more paternal than that of England, retained in her hands

the whole trade of the colonies, and guarded her monopoly with the severest penalties. The colonists, who were compelled to root up their vines and olives, were not allowed to raise or manufacture any article the mother country could supply. It was a vital part of that policy to bestow upon natives of the peninsula all offices, from the highest to the lowest, in order to create an official and privileged caste, distinct from the people in feelings and interests. And yet, despite the thralldom incident to such an organized system of oppression, the loyalty of Spanish America blazed forth, and poured large contributions of money into the hands of Ferdinand's adherents, when the regency established in Spain presented the semblance of a patriot government. Not until the only government to which the colonists recognized allegiance had fallen into abeyance, did they resolve to declare themselves independent. Through spontaneous popular efforts "juntas of government" were formed at Caracas in April, 1809, at La Paz in Upper Peru in July, at Quito in August, at Santa Fé and at Buenos Aires in May, 1810, and at Santiago in Chili in September of the same year. In Mexico the revolutionary movement began at Dolores in 1810 and soon wore a more prosperous appearance. In Guatemala, the last portion of America to throw off the Spanish yoke, the persons in office assembled in 1821 and formed a junta. Finally an elective assembly was called which declared the country independent and established a constitution in July, 1823.¹ By that time Spain had been deprived of all her possessions in the New World except Cuba and Porto Rico. Thus was the field cleared for the creation of popular governments, on the American plan, in the three vast areas now occupied (1) by

Oppressions
of colonial
system.

Loyalty of
colonists.

Revolutionary
move-
ments.

Independence
declared in
July, 1823.

Popular
govern-
ments on
North
American
plan.

¹ Under that constitution the five nations (Guatemala, Nicaragua, Honduras, El Salvador, and Costa Rica) became states of a union known as "*Federación de Centro América*."

Mexico; (2) by the Central American states of Costa Rica, Nicaragua, Honduras, Salvador, Guatemala, and Panama; and (3) by the South American states now known as the Argentine Nation, the United States of Brazil, the United States of Venezuela, the Republic of Uruguay, the Republic of Chili, the Republic of Peru, the Republic of Ecuador, the Republic of Colombia, the Republic of Paraguay, and the Republic of Bolivia. Of these seventeen sovereignties thirteen are single states and four federal unions.¹

Consti- tutions of single states.	5. The thirteen single states are Guatemala, Salvador, Nicaragua, Costa Rica, Honduras, Panama, Uruguay, Chili, Peru, Ecuador, Colombia, Paraguay, and Bolivia. A new
Guatemala.	constitution promulgated in Guatemala December 11, 1879, was put in force on March 1, 1880. That constitution, as
Salvador.	amended November 5, 1887, is the one now in force. ² Salvador is governed by the constitution of August 13, 1886.
Nicaragua.	Nicaragua is governed by the constitution of March 30, 1905. ³
Costa Rica.	Costa Rica is governed by the constitution of December 7, 1871, as amended in 1882 and subsequent dates. ⁴
Honduras.	Honduras is governed by the constitution promulgated September 2, 1904. Panama is governed by the constitution adopted
Panama.	February 13, 1904. Representatives of the Uruguayan people met at Montevideo and framed the constitution of
Uruguay.	September 10, 1829, which, after being approved (May 26, 1830) by the Brazilian and the Argentine governments, was sworn to and put in operation July 18 of the same year.

¹ As to the constitutions of the republics on the Caribbean Sea, — the Dominican Republic, the Republic of Haiti, and the Republic of Cuba, with the treaty defining its relations to the United States, proclaimed July 2, 1904, see *American Constitutions* published by International Bureau of the American Republic, José Ignacio Rodríguez, chief translator, ii. 7-154.

² Cf. Arosemena (Justo), *Estudios constitucionales sobre los Gobiernos de la América latina*. Paris, 1878.

³ Cf. Fernandez Somoza (Dr. J.), *Curso de Derecho constitucional nicaragüense*. Managua, 1899.

⁴ Cf. Calvo (Joaquin Bernardo), *República de Costa Rica*. San José de Costa Rica, 1886.

That constitution, with some slight modifications, is the one now in force. On August 8, 1828, a new "National Political Constitution" was promulgated for Chili, but, under a law passed in October, 1831, a convention was called for the purpose of reforming it. On May 23, 1833, the constitution then framed went into effect, which constitution, as amended to June 26, 1893, is now in force.¹ Peru is governed by the constitution promulgated November 10, 1860, the last of five in force since 1823. A congress which met at Riobamba on August 14, 1830, promulgated the first constitution of the Republic of Ecuador. Since then eight have been adopted. The last, promulgated in 1897, is now in force.² Colombia is governed by the constitution of August 4, 1886.³ A convention assembled in August, 1870, framed a constitution for Paraguay, promulgated on the 25th of the following November, which is still in force. The constitution drafted for Bolivia by Bolivar in 1826 remained as the fundamental law until 1831. By it the legislative powers were vested in three chambers, each consisting of thirty members. That constitution was superseded by another promulgated in 1831 and amended three years thereafter. Both of them provided that the legislature should consist of not more than two chambers. In October, 1836, another constitution was

Chili.

Peru.

Ecuador.

Colombia.

Paraguay.

Bolivia.

Three
chambers.

¹ It was maintained before the Claims Commission established at Washington under the treaty of August 7, 1892, between Chili and the United States, that "on the 31st of October and the 18th of November, 1816, the territory later known by the name of the Republic of Chili was a Spanish colony. The Commission decided that as the Washington government did not recognize Chili as an independent nation until 1822, Chili up to that date was nothing to the United States but a county *de jure* under the domination of Spain." As to the constitution of Chili, see Carranza (Arturo B.), *Digesto constitucional americano*, Buenos Aires, 1900.

² Ecuador was called "the kingdom of Quito" (*El Reino de Quito*) until 1564. Subsequently it was called the presidency of Quito (*La Presidencia de Quito*).

³ Upon the disruption in 1830 of the Republic of Colombia (the Great Colombia), as constituted by Bolivar, the three Republics of Venezuela, New Granada (the present Colombia), and Ecuador came into existence.

English
consti-
tutional
ideas the
basis.

Division
of powers.

Consti-
tutional
guarantees.

Trial
by jury.

adopted, which has been followed by those of 1843, 1851, 1861, 1868, 1871, 1878, and 1880. The latter is still in force.¹ Students of comparative politics naturally contrast the foregoing constitutions with those of the individual states of the North American Union of which they are conscious and substantial reproductions. So far as political theory is concerned Latin-American statesmen have accepted the entire fabric of English fundamental ideas in the form in which they have been restated in the Declaration of Independence and in the Bills of Rights annexed to our state constitutions. Guatemala declares, as her sister states declare, that "the supreme power of the Nation is republican, democratic, and representative, and is divided into three branches, namely, legislative, executive, and judicial, which shall be entirely independent of each other in the exercise of their functions."² That English idea, in the dogmatic form it has assumed in the North American states, is universally accepted. Chili declares that "the sovereignty is vested essentially in the Nation, which delegates its exercise to the authorities established by this constitution."³ The authorities so endowed with power are limited in its exercise by declarations contained in Bills of Rights usually entitled "guarantees," which secure to the citizen freedom of speech, the right of petition, due process of law, the right of habeas corpus, exemption from *ex post facto* laws, and the like. In many instances trial by jury in criminal cases is guaranteed. Nicaragua goes so far as to declare that "in civil cases the parties may have the facts passed upon by a jury. The verdict having been rendered, the judge shall limit his action to the application of the law."⁴ The movement in that direction is, however, still tentative. The constitution of Uruguay provides

¹ Cf. Sanjinés (Jenaro), *Las Constituciones políticas de Bolivia. Estudio histórico y comparativo*. La Paz, 1906.

² Constitution of 1879, title 1, art. 3.

³ Constitution of 1833, ch. 1, art. 3.

⁴ Title xii., art. 90.

that "one of the first attentions of the General Assembly shall be to endeavor to establish trial by jury as soon as possible, in criminal cases and even in civil ones."¹ The same tentative advance is being made in the direction of religious liberty. While many of the constitutions declare that "the religion of the state is Roman Catholic Apostolic," others provide a qualified freedom within the temples, or an absolute freedom, as in Honduras, where the provision is that "the free exercise of all religions shall be guaranteed."² In the same way a tentative advance is being made toward the acceptance of the all-important American principle that to the judiciary belongs the right to declare unconstitutional enactments null and void. Before that principle can triumph in Latin America it must overcome the idea that the ultimate power of construction belongs to the chamber or chambers by which statutes are enacted. Typical illustration of that idea may be found in the constitutions of Costa Rica, Uruguay, Chili, Peru, and Ecuador. In Chili the provision is that "Congress alone shall have the power to settle, in conformity with Article 31 and the following of the Constitution, any doubts that may arise in regard to the interpretations of the provisions of the same."³ A contrary tendency appears in the constitutions of Nicaragua, Honduras, Panama, Colombia, Paraguay, and Bolivia. The first named provides that to the judicial power belongs the right "to apply the laws in the individual cases submitted to its examination, to interpret their provisions in accordance with the spirit of the constitution, or not to apply them, on its own responsibility, when they prove to be contrary to the said constitution";⁴ the second named provides that "the power to render judicial decisions, and to enforce them, belongs to the courts of justice. They shall apply the law to the concrete cases

Imperfect religious liberty.

Right to declare statutes void.

Its opponents.

Its advocates.

¹ Sec. xi., art. 137.

² Title v., art. 46.

³ Ch. xi., art. 155.

⁴ Title xii., art. 92 (3).

legally submitted to their cognizance, and shall refuse to comply with any law when it is contrary to the constitution";¹ the third named provides that "if the Executive objects to a bill on the ground of unconstitutionality, and the National Assembly insists upon its passage, the bill shall be referred to the Supreme Court, which shall render its decision within six days. If the action of the Assembly is sustained by the court, the Executive shall be bound to sanction and promulgate the bill as law; if the bill is pronounced unconstitutional, it shall be sent to the archives."² It is certainly worthy of note that the seven single states of South America — Uruguay, Chili, Peru, Ecuador, Colombia, Paraguay, and Bolivia — have, without an exception, accepted the English bicameral system in the organization of their national legislatures. In these states senates and houses of representatives, on the North American plan, are everywhere to be found. On the other hand, the six single states of Central America — Guatemala, Salvador, Nicaragua, Costa Rica, Honduras, and Panama — have, without an exception, national legislatures consisting of one chamber only. Such, in general terms, is the form in which English constitutional law, with its North American modifications, has been reproduced in the constitutions of the single states of Central and South America which are now passing through a process of steady and hopeful development. The most striking point of unlikeness is in local organization, the Latin-American states lacking that tenacious substructure of self-help and self-government embodied in the English township and county systems.

Bicameral
system
accepted in
South
America.

Rejected in
Central
America.

Lack of
strength in
local or-
ganization.

Consti-
tutions of
federal
states.

Mexico.

6. The four federal unions of Latin America are entitled the United States of Mexico, the Argentine Nation, the United States of Brazil, and the United States of Venezuela. The first named embraces twenty-seven states and two

¹ Title xii., art. 106.

² Title x., art. 105.

territories, with a federal district wherein is situated the city of Mexico, the capital of the Union. The first Mexican Congress (*Congreso de Anahuac*) met at Chilpancingo, September 14, 1813, and on November 6 solemnly proclaimed the independence of Mexico. On October 22, 1814, was promulgated the first Mexican constitution, vesting the executive power in three persons to be elected by Congress. The monarchical scheme embodied in the *plan de Iguala*, of February 24, 1821, was overturned by a revolutionary movement at the end of the following year. The second constitution of Mexico (*Constitución de los Estados Unidos Mexicanos*), promulgated October 4, 1824, established a federal republic similar to that of the United States. On January 1, 1837, a new constitution was promulgated, rejecting the federal principle, and reducing the states to the status of provinces (*departamentos*), subject to a central government, republican in form. On May 15, 1856, President Comonfort, acting under the provisions of the Ayutla platform, as amended at Acapulco, promulgated the constitution called "Provisional Organic Statute of the Mexican Republic." That statute was superseded February 5, 1857, by the present "Political Constitution of the Mexican Republic."¹ The Argentine Nation is a union of fourteen provinces (or states), each with its own constitution, and retaining all the powers not delegated to the federal government. The revolution of May 25, 1810, culminated in the resignation of the last Spanish viceroy and the establishment at Buenos Aires of a "*Junta Provisional*." The revolution of October 8, 1812, culminated in the meeting, on January 31, 1813, of a congress, or "*Asam-*

Argentine
Nation.

¹ Cf. Castillo de Velazo (José del), *Derecho constitucional*, Mexico, 1871; Coronado (Mariano), *Derecho constitucional*, Guadalajara, 1899; Gamboa (J. M.), *Leyes constitucionales*; Montiel y Duarte, *Derecho público mexicana*, Mexico, 1871; Moreno Cora (Silvestre), *El juicio de amparo*; Torre (Juan de la), *Constitución mexicana*, Mexico, 1904; Vallarta (Ignacio L.), *Juicio de amparo y Votos*, Mexico, 1895.

blea General Constituyente," which abolished slavery, adopted a national coat of arms, provided for the coinage of national money, and either repealed or amended various Spanish laws then in force. A new Congress assembled March 24, 1816, elected a "Director Supremo" of the Union and made the Declaration of Independence of July 9, 1816. Three years thereafter the Congress of Buenos Aires framed the Constitution of 1819, proclaimed and sworn to May 25 of the same year. On December 16, 1824, a *Congreso General Constituyente* met at Buenos Aires and proclaimed on January 23 following a "fundamental law," declaring that the provinces renewed their compact for the preservation of the national independence, and that, until a constitution should be framed and adopted, they would rule themselves by laws of their own. Not until May 1, 1853, was a federal constitution, having for its model the Constitution of the United States, proclaimed at Santa Fé. On September 25, 1860, that constitution was amended by a convention held at the same city, and, as amended, it is the one which ever since, with certain minor modifications, has been in force.¹ Brazil was an empire until November 15, 1889, when in a single day, and without bloodshed, the monarchy was overthrown. Emperor Dom Pedro II. then abdicated the crown, and a republic was created on the basis of the federation of the provinces, twenty in number, elevated to the status of states. The existing federal constitution dates from February 24, 1891.² On July 5, 1811, the "representatives of the United

United
States of
Brazil.

¹ Cf. Carranza (Arturo B.), *República Argentina, constitución Nacional y constituciones provinciales vigentes*, Buenos Aires, 1898; Castro (Máximo) y Calandrelli (Alcides V.), *Nociones de Derecho Constitucional*, Buenos Aires, 1895; Sarmiento (Domingo F.), *Comentarios de la Constitución de la Confederación Argentina*, 1853.

² *Constituição da República dos Estados Unidos do Brazil* acompanhada das leis organicas publicadas desde 15 de Novembro de 1889, Rio de Janeiro, Imprensa nacional, 1891; Freire (Felisbello), *Historia Constitucional da República dos Estados Unidos do Brazil*, Rio de Janeiro, 1894; Rodrigues (José Carlos), *Constituição da politica do Imperio do Brazil*, Rio de Janeiro, 1863.

Provinces of Caracas, Cumaná, Barinas, Margarita, Barcelona, Mérida, and Trujillo, forming the American Confederation of Venezuela, in the Southern Continent, in Congress assembled," declared that said United Provinces were and ought to be from that day, *de jure* and *de facto*, free and independent states, and that they were absolved from all allegiance to the crown of Spain. On December 21 the said Congress framed a federal constitution for the "United States of Venezuela," by which the executive power was vested in a triumvirate, directly elected by the people; the legislative in a general congress, consisting of a senate and a house of representatives; and the judicial in a supreme court and various inferior courts. On December 17, 1819, Venezuela became a member of the "Republic of Colombia," usually called "the great Colombia," and so continued down to its disruption ten years later. Then it was that Venezuela promulgated its own constitution of September 22, 1830.¹ Since that time it has had eight constitutions, promulgated respectively on April 18, 1857, December 31, 1858, April 22, 1864, May 27, 1874, April 27, 1881, June 21, 1893, March 26, 1901, and April 27, 1904. The existing constitution provides that "the Districts constituting the Venezuelan Federation shall be so grouped to form the states of Aragua, Bermúdez, Bolívar, Carabobo, Falcón, Guárico, Lara, Mérida, Miranda, Táchira, Trujillo, Zamora, and Zulia." It is further provided that "the states composing the Venezuelan Union are autonomous and politically equal; they shall preserve in all its plenitude the sovereignty not delegated in this Constitution, and bind themselves: 1. To organize their own governments, in such a way as to make them popular, elective, federal, representative, alternative, and responsible, and to frame their respective constitutions in accordance with the principles of

United
States of
Venezuela.

State
autonomy
in Vene-
zuela and

¹ Spain did not recognize the independence of Venezuela until the 26th of March, 1845.

Mexico.

this fundamental compact.”¹ The constitution of Mexico provides that: “The people exercise their sovereignty through the federal powers in matters belonging to the Union, and through those of the states in the matters relating to the internal régime of the latter. This power shall be exercised in the manner respectively established by the constitutions, both federal and state. The latter shall in no case contravene the stipulations of the federal compact.” Such provisions reveal a definite and earnest purpose to construct artificially out of a province or district of Latin origin an autonomous state that shall stand to the federal head in the same independent relation in which a North American state, of English origin, stands to the federal head. The fact that such an effort is necessary reveals, however, the most striking fundamental difference that divides federal unions in the two Americas. In the southern group there is an absence of the naturally organized system of local self-governing communities, the peculiar product of the English race, out of whose coalescence the typical English states in the northern group have arisen. In speaking of the latter Bryce has well said: “They existed before it [the Union]. They could exist without it.”² And to that may be added Tocqueville’s declaration: “To examine the Union before we have studied the states, would be to adopt a method filled with obstacles. . . . The great political principles which now govern American society undoubtedly took their growth in the state.”³ The self-sustaining and preëxisting state, as the source of the principles of local self-government, is the great desideratum in the federal republics of Latin

Weakness
in the sub-
structure.

¹ Title ii., art. 7, i. The best translations of the federal constitutions in question are to be found in the *American Constitutions*, i. 37-232, so ably edited by the accomplished scholar and jurist, José Ignacio Rodríguez, the author’s friend, who completed his long and important task just before death closed his long and useful life.

² *The American Commonwealth*, i. 14.

³ *Democracy in America* (Bowen’s ed.), i. 73, 74.

America. And yet, despite that drawback, the progress which has been made is wonderful indeed. There is no reason to doubt that it will be continuous, and that wise administrators will there gradually infuse into the several state systems an adequate degree of the spirit and practice of local autonomy.

The effort to remove it.

The superstructures of the four federal states in question approach very closely the prototype after which they were fashioned. Each embodies the "wholly novel theory" of a federal government, — strictly organized, and divided into three departments, executive, legislative, and judicial, — operating directly upon the individual and not upon states as corporations. The constitution of Mexico, which will be taken as typical, provides that "the supreme power of the Federation is divided for its exercise into legislative, executive, and judicial. Two or more of these powers shall never be united in one person or corporation, nor shall the legislative power be vested in one individual." It is then provided that "the legislative power of the nation is vested in a general congress which shall consist of a chamber of deputies and a senate."¹ The exclusive powers of each house and their relations to each other as coördinate bodies are substantially the same as in our own system. The Mexican senate is, however, armed with these extraordinary and exclusive powers: "To declare, when the constitutional, legislative, and executive powers of any state have disappeared, that the moment has arrived to give the said State a provisional governor, who shall order elections to be held according to the constitutional law of the State. The appointment of such governor shall be made by the Federal Executive with the approval of the Senate, or in its recess of the permanent committee. . . . To decide any political questions which may arise between the powers of a State, if any of them applies to it, for that purpose, or

Super-structures of federal states.

Division of powers.

Extraordinary powers of senate.

¹ Title iii., arts. 50, 51.

Interstate
commerce.

Permanent
Deputation.

Judicial
system.

when the constitutional order has been interrupted by an armed conflict in consequence of said questions.”¹ Thus these wise provisions offer a remedy in cases necessarily incident to an undeveloped state autonomy. As the equivalent of our interstate commerce clause, which provides that “the Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,”² the Mexican constitution provides that the Congress shall have power “to enact laws fixing the duties to be levied on foreign commerce, and prevent, by general provisions, onerous restrictions from being established on the commerce between the states.”³ A part of the federal machinery that finds no counterpart in our own is represented by what is known in the Mexican constitution as the Permanent Deputation, a body formed out of the two houses to act as a check on executive authority. In the vacation of Congress it is authorized to do those things that must be done by the chambers when in session in order to give validity to executive acts.⁴ In Mexico the judicial power is vested in a supreme court, and in district and circuit courts, whose jurisdiction extends, in a general way, to all matters of which our federal courts have jurisdiction, except that they have no jurisdiction of causes arising under their federal constitution, and under laws affecting private interests only, such being vested in the state courts. Neither have the Mexican federal courts jurisdiction of cases on the ground of diverse citizenship, whilst the jurisdiction over controversies between a state and the citizen of another state, denied by our Eleventh Amendment, still exists under that system. The jurisdiction of the supreme court is appellate, except in controversies between state and state, and between Union and state, and

¹ Title iii., par. iii., B. v., vi. Amendments.

² Art. i. 8.

³ Title iii., par. iii., art ix.

⁴ Title iii., par. iv., as amended September 25, 1873, and November 13, 1874.

as to questions of jurisdiction between the tribunals of states, between federal tribunals asserting conflicting jurisdictions and between state and federal tribunals.¹ Instead of our first ten amendments the Mexican constitution contains a formal bill of rights in which "the rights of man" ("*de los derechos del hombre*") are protected by all the "individual guarantees" provided by English constitutional law. As Article 29 provides for the suspension of such guarantees, under certain circumstances, Article 101 provides that "the tribunals of the Federation shall decide all questions arising out of: I. Laws or acts of whatever authority violating individual guarantees. II. Laws or acts of the federal authority encroaching upon or restricting the sovereignty of the states. III. Laws or acts of the state authorities invading the sphere of the federal authority." Article 102 provides that: "All the cases referred to in the preceding article shall be conducted, on petition of the aggrieved party, according to rules of proceedings which a special law shall establish. The decision shall always be rendered in such a language as exclusively to affect the individuals concerned in the case, limiting itself to defend and protect them in the special case to which the proceedings refer, without making any general declaration respecting the law or the act which gave rise to the case." In protecting rights under that grant of jurisdiction the courts hold acts of the federal congress and of the state legislatures unconstitutional and void, and restrain their enforcement by appropriate remedies. Under the implied powers granted by Articles 101 and 102 the courts issue, in lieu of the writ of habeas corpus, the writ of *Amparo*, which combines the functions of habeas corpus, mandamus, sequestration, injunction, and prohibition, and protects the

A formal
bill of
rights.

Suspension
of guar-
antees.

Limitation
of judicial
decisions.

Writ of
Amparo.

¹ Cf. the instructive paper read by William H. Burgess, July 13, 1905, before the Texas Bar Association, and entitled "A Comparative Study of the Constitutions of the United States of Mexico and the United States of America."

citizen against unlawful encroachments on either his person or property.¹

Trial by
jury.

Abolished
as to press
offenses.

In use in
Federal
District of
Mexico.

Mexican lawyers have manifested but little inclination to accept trial by jury. Article seven of the federal constitution provided that, "Trials for offenses committed through the press shall be held before a jury which shall pass upon the facts and another jury which shall apply the law and fix the penalty to be imposed." But as the practical result was the acquittal of the accused in all such cases, the constitution was so amended, May 15, 1883, as to abrogate jury trials even as to press offenses, which are now punished like crimes of any other character. The only remaining experiment is that now in force in the Federal District, corresponding with our District of Columbia. Señor Matias Romero, for a long time the very able envoy of Mexico at Washington, has told us that Señor Mariscal, when secretary of state, "made a special study of the jury system in the United States, and when he went home and became secretary of justice under President Juarez's administration, he established, in 1869, a jury system in the Federal District of Mexico for criminal cases, changing it somewhat, so as to adapt it to the peculiar conditions of the Mexican character. . . . Under the system of jurisprudence prevailing in the Federal District of Mexico all the preliminary proceedings in a criminal trial, such as the examination of the accused, the taking of testimony, etc., takes place before the judge who presides over such proceedings without a jury; when this has been completed and the case is ready to be submitted, the jury is impaneled and the evidence is read to it, as set forth in the record already formed; the prosecuting attorney then presents the charges, the defense is heard, and the witnesses of both parties are examined and cross-examined; thereupon

¹ As to the writ of habeas corpus and *Amparo*, see Romero, *Mexico and the United States* (1898), p. 145.

the jury renders its verdict adjudging the accused either innocent or guilty, following substantially the practice under the common law of England and of the United States. In most of the Mexican states the old Spanish system of criminal jurisprudence yet prevails." ¹ By the code of criminal procedure of July 6, 1891, it was provided that the jury should consist of nine members, a majority of whom could render a verdict. The number has since been raised to fifteen, with the majority rule unchanged. With that statement appropriately ends the foregoing attempt to explain the extent to which English public law, in its North American form, has been embodied in the outer shells of Latin-American states, single and federal. Even to the casual observer it is manifest that it has been accepted as the basis of the entire constitutional system, so far as it could be assimilated by Latin peoples who do not possess the peculiar local forms of self-governing communities in which the English race has been trained in self-government. Nothing could be more complete than the acceptance of the English political theory of liberty as it has been unfolded from Magna Carta down to and including the Declaration of Independence. The great formulas have all been reproduced in Spanish or Portuguese forms that adhere very closely to the originals. The three fundamentals that have been accepted tentatively are: (1) the right of the judicial power to declare laws unconstitutional; (2) trial by jury, even in criminal cases; (3) the English bicameral system of legislatures. And yet such decided progress is being made even in those particulars that it is not dangerous to predict that in the near future the constitutions of Latin-American states will be identical, in every material particular, with the prototypes after which they have been modeled. But while that is being said as to the public law of such states, the fact should not be forgotten that each and

Unani-
mous ver-
dict not
required.

English
public law
the basis.

Three
funda-
mentals
accepted
tentatively.

¹ See *Mexico and the United States*, p. 411.

Roman
private law.

all of them are clinging with tenacity to their interior codes of private law, all of Roman origin. There is no reason to doubt that as time goes on that immortal and universal system of private law will wax stronger and stronger in the great and growing empire to the south of us, which is destined to illustrate to the world the fact that the most perfect of all state law systems is that in which the constitutional law is English and the interior private law, Roman.

Latin-
American
codes.

7. From what has been said it clearly appears that into the American colonies founded by Spain Roman private law passed in the form in which it was embodied in the *Siete Partidas*; that into the great colony of Brazil, dominated by Portugal, Roman private law passed in the form in which it was embodied in the *Ordenações Philippinas* of 1603. Upon these fundamental bases Latin-American private law reposes within the two great areas in question, just as North American private law reposes upon the basis of the law of England. To the student of comparative law the codifications of Latin America offer an unplowed field as rich as it is inaccessible. It is greatly to be deplored that it is now impossible to procure even at Washington the data necessary for such an investigation.¹ There is, however, one great invention contained in the constitution of at least one of the federal states to the south of us that should be made the subject of serious reflection. The federal constitution of Mexico, as amended December 14, 1883, provides that the congress shall have power "to promulgate mining and commercial codes, which shall be observed throughout the whole Republic. The banking law shall form a part of the code of commerce." The growing inconveniences arising out of the conflict of commercial and other laws in their nature national,

A great
invention.

¹ There is good reason to hope that within a comparatively short time the codes of all the Latin-American republics will be procured by the Library of Congress.

such as the law of divorce, must inevitably force the vesting, by constitutional amendment, of a like code-making power in the Congress of the United States.

8. The Roman-Dutch law is the common law of all the South African colonies, as well as of Ceylon and British Guiana. While to an uncivilized country, such as America was, English subjects carry with them, as their birthright, the laws of England existing when the colonization takes place,¹ in a civilized one the laws prevailing at the time of conquest are continued, until an alteration is made.² The Dutch East India Company, in founding their settlements in the East Indies and at the Cape of Good Hope, took with them to their colonies the law of Holland, which thus came to be administered in two hemispheres. At the time of the first capture by the British in 1795 of the Cape of Good Hope, the Roman-Dutch law then in force, including all the general placaaits issued by the Dutch East India Company, was retained. No general legislative change was made at the annexation in 1806. In *Seaville v. Colley*, 9 S.C. 44, De Villiers, C.J., said: "The conclusion at which I have arrived as to the obligatory nature of the body of laws in this Colony, at the date of the British occupation in 1806, may be briefly stated. The presumption is that every one of those laws, if not repealed by the local Legislature, is still in force."³ In British Guiana, acquired by England in 1814, the Roman-Dutch law prevailing in the colony at the time of the acquisi-

Roman-Dutch law in South Africa, Ceylon, and British Guiana.

¹ *Blankard v. Galdy*, 2 Salk. 411; the decision of the Lords of the Privy Council, 2 P. Wms. 75; *Dutton v. Howell*, Show. Parl. Ca. 31, 32; 1 Blackst. Comm. 107.

² That rule must, however, be qualified by Judge Tarring's statement that "laws contrary to the fundamental principles of the British Constitution cease at the moment of conquest." *The Law of the Colonies*, p. 23. See also Calvin's Case, 7 Co. 17; Kent, Comm., 12th ed. (Holmes), i. 645.

³ That presumption will not, however, prevail in regard to any rule of law inconsistent with South African usage, the best proof of which is to be found in judicial decisions. See Nathan, *Common Law of South Africa*, i. 19. Grahamston and London, 1904.

tion is followed, where local ordinances and proclamations having the force of law do not apply. In Ceylon, while the English law of evidence, trial by jury in the more serious criminal cases, and the English mercantile law have been introduced as in South Africa, by local enactments, the Roman-Dutch law applies where no other system of law specially applies. In the colony of Natal, which was proclaimed as a British possession in 1840, the common law of the Cape of Good Hope, Roman-Dutch law, was by proclamation made to apply. Chapter 9 of the constitution of the Orange Free State (§ 57) provided that, "Roman-Dutch law shall be the principal law of this State, in cases where the Volksraad has made no other law applicable to the circumstances." A word should here be said as to the origin and nature of the Roman-Dutch law thus transferred from Holland to her colonies. It is clear that the original body of observances and rules that govern the people of Holland in their conduct and mutual intercourse was of customary growth and Teutonic in its origin like the customary law of England. From traces of sacerdotal legislation (such as regulations relating to divorce and separation from bed and board) still to be found in collections of Dutch law, it appears that the customary law was first modified by infusions drawn rather from the canon law than from the civil law of Rome. It was the spread of the feudal system and the adoption with it of many Frankish or French, as opposed to German, ideas and customs that brought about the introduction of Roman civil law. While there is no certainty as to the date, that change seems to have taken place about the ninth or tenth century. On the authority of Van Leeuwen it may be stated that the feudal law was specifically made the common law of the Netherlands, by proclamations issued at various times by the Emperors Henry, Lothair, Conrad, and Frederick Barbarossa. One of the feudal lords of Holland and the adjoining terri-

Natal.

Orange
Free
State.Origin and
nature of
Roman-
Dutch law.Influence of
canon law;of feudal
law.

tories was King William II., the eighteenth Count of Holland, who "being crowned and confirmed as King of the Romans by the Princes of the Empire, when he was about twenty years of age, resolved that the Dutch should use the Roman law in the future." When the canon law was abrogated at the Reformation, the secular system, Roman civil law, entirely supplanted it, and henceforth the two systems, Teutonic customary law and Roman law, became indissolubly blended, and formed the system known as Roman-Dutch law. Where such customary law, general or local, did not apply, the Roman law, particularly that which was found in the Code, Pandects, Institutes, and Novels of Justinian, was resorted to by the general Court of Pleas in Holland, the earliest Dutch court. As novel circumstances, to which the Roman law did not apply directly, or could not be made to apply by way of analogy, arose, general or special laws, known as Placaats or Ordinances, were framed and promulgated to meet the wants of the people of the Netherlands. It thus appears that while Roman law did not replace Dutch customary law, it was introduced into the Netherlands as a system, and then modified by customary law. If a custom was not as universal as the original law which it modified, or professed to modify, the original law still remained in force in those places where the modifying custom was not in vogue. For instance, a custom modifying the application in the town of Amsterdam of the general Dutch law did not alter that law; and if the Dutch law was afterwards imported bodily into another country (such as the Cape of Good Hope), the Amsterdam custom did not affect it. The modification might also take place by means of a general statute or by abrogation through disuse. There is a passage in the Digest in which Julianus says, "The doctrine has been most properly accepted, that laws are abrogated, not only by the vote of the legislator, but also by the tacit consent of all, through disuse." The operation

Roman law
imposed by
William II.

Modified by
Placaats or
Ordinances.

Special
customs.

Abrogation
through
disuse.

Alterations
after im-
portation
from
Holland.

of that doctrine Voet is inclined to confine to countries in which a democratic form of government prevails; that is, in which the power of legislation rests with the people as distinguished from those in which the power has been delegated to a *princeps*. Any alteration whether by statute, proclamation, or custom, which has been made in Roman-Dutch law after its importation from Holland into any other country, is not Roman-Dutch law, but the law of the country where such alteration takes place. The Roman-Dutch law is, and can only be, the Roman law as it existed in Holland, and as it was modified by Dutch customs and ordinances.¹

Roman-
Dutch
jurists.

The Roman-Dutch law, consisting of the *Corpus Juris Civilis*, as modified by general Dutch statutes, placats, and customs, was not contained in any one enactment, or in any series of enactments, and it remained an undigested mass until it was restated in a concise and systematic form by the unimaginative jurists of Holland who flourished during the period between 1500 and 1800, and whose writings reflect in an eminent degree the real spirit and intention of Roman law. From all parts of the world law students were drawn to the Universities of Leyden and Utrecht, whose fame, despite Holland's vicissitudes, is still fresh in the dawn of the twentieth century. As early as 1536 Andreas Gail or Gayll published at Amsterdam his *Practicarum Observationum Libri duo*. Four years before his death in 1587 was born at Delft Hugo Grotius (Huig van Groot), whose *Introduction to Dutch Jurisprudence* (written in 1620 and published in 1631) was the first concise account of Roman law as it stood in his

Universi-
ties of
Leyden and
Utrecht.

Gail.

Grotius.

¹ "Thus the Roman-Dutch law as applied in the colony of British Guiana is the law as it existed in that colony at the time of its cession in 1814. Any subsequent changes in legislation, whether made by the Crown in Council, by the Governor on the advice of the Executive Council, or by the Court of Policy, though they may change, modify, or repeal provisions of Roman-Dutch law, do not constitute Roman-Dutch law, but British Guiana law." Nathan, *Common Law of South Africa*, i. 6. See also pp. 2-5.

day. The *De Jure Belli ac Pacis*, written in 1623–1624, was published in 1625. In that year was born Simon van Leeuwen (ranked by Chief Justice Kotzé next after Grotius), who published in 1662 an edition of the *Corpus Juris*, with annotations founded on the *Corpus Juris Civilis* of Dionysius Grothofredus, and in 1678 his *Commentaries on Roman-Dutch Law*. Paul Voet, who was born in 1619, published in 1661 his most important work (*De statutis eorumque concursu*), the precursor of modern treatises on international private law. In 1647 was born at Utrecht his son, John Voet, for whose great achievements Grotius, Van Leeuwen, and the earliest jurists had paved the way. In 1670 appeared his treatise on Military Law (*De jure militari*), and in 1673 his essay on the Division of Inheritances (*De familia erciscunda*). After 1681 he passed from the University of Utrecht to that of Leyden, where he delivered luminous expositions of Roman law, combined with statements of the Dutch customary law, and with definitions of the extent to which the two systems had acted and reacted upon each other. In 1698 appeared the work that placed him at the head of the Continental expositors of jurisprudence, entitled *Commentarius ad Pandectas*, with the subtitle *In quo praeter Romani juris principia ac controversias illustriores, jus etiam hodiernum, et praecipuae fori quaestiones excutiuntur*. These commentaries are valuable, not merely as an exposition of Roman-Dutch law, but as a discussion of the principles of jurisprudence in general, and of Roman law in particular. The last of the distinctively Roman-Dutch law writers in Holland was Joannes van der Linden, who published in 1794 his *Verhandeling over de Judiciele Practijcque*; in 1803, his *Verzameling van merkwaardige gewijsden der gerechtshoven in Holland* (Collection of Important Decisions of the Courts of Justice of Holland); and in 1806, his celebrated *Rechtsgeleerdheid Practicaal en Koopmans Handboek* (Institutes of the Law of Holland), still recognized

Van
Leeuwen.

Paul Voet.

John Voet.

Van der
Linden.

Dutch
legislation
after
Napoleon.

as the best elementary treatise on Roman-Dutch law. During the Napoleonic occupation of the Netherlands were introduced the codes which have ever since governed Holland and Belgium. The importation of the Roman-Dutch law into other countries, and its interpretation there, is not influenced by Dutch legislation after the conquest of Holland by Napoleon. Thus Roman-Dutch law is interpreted in the colonies only by Van der Linden and the writers before him, just as English law is interpreted in the United States only by the English jurists who flourished prior to certain dates.¹

Roman
law in
Scotland.

Few
Celtic
survivals.

Similarity
of Scotch
and English
law in
fourteenth
century.

*Regiam
Majestatem.*

9. The same general causes that brought about the introduction of Roman law into Holland and other Continental countries brought about its introduction into Scotland, whose early law, down to the fourteenth century, was in a general way composed of the same elements and subject to the same influences as the law south of the Tweed. As the population of Scotland was chiefly drawn, except in the central and western highlands, from Teutonic sources, though with a considerable admixture of Celtic blood, the laws and institutions of the people, like their language, were fundamentally English. As in England, Celtic law, which seems to have disappeared at an early date, left behind it but few traces. While the Norman element in the population was never large, the law of unconquered Scotland was deeply influenced by Norman law through the adoption of the feudal system as developed by the Normans. Though probably more heterogeneous and less systematized, the law of Scotland, in the fourteenth century, was substantially the same as the law of England, a conclusion sustained by the fact that the compiler of the *Regiam Majestatem*, the earliest treatise on Scotch law, simply adopted with a few alterations the treatise of Glanvill

¹ See also George T. Morice, *English and Roman-Dutch Law*, Oxford, 1903; Bell and Nathan, *Legal Hand Book of British South Africa*, Grahamston, 1905; Van Zyl, *The Judicial Practice of South Africa*, London and Cape Town, 1902.

on the law of England.¹ The *Regiam Majestatem*, carefully collated with Glanvill's work in the Acts of the Parliament of Scotland (vol. I.), was accepted as an authoritative statement of the law of Scotland and maintained its authority until the reception of Roman law in the form of the *Corpus Juris*. From the beginning of the fourteenth century down to the sixteenth new influences began to work which were rather Continental than English. During that period, as the leading statesmen and jurists were ecclesiastics, ideas and phraseology drawn from Roman sources filtered into Scotch law from the canon law as well as from certain of the Continental systems. At that time the consistorial courts of the bishops had an extensive jurisdiction that embraced not only the law regulating the domestic relations, but also contract and succession. Such was the prelude to the great change that took place in the sixteenth century when, with the revival of letters, Roman law began to come in like a flood, and to affect fundamentally the entire structure of the law of Scotland. The rapid change thus brought about, neither by legislative enactments nor by popular movement, is intimately associated with the reorganization of the courts, whereby the judicial power passed from the territorial magnates into the hands of trained jurists, lay and clerical. Prior to that event the chief secular legal tribunals — the Parliamentary Committee of the Lords Auditors and the Judicial Committee of the King's Council — were too weak, and the local courts in which the barons and their deputies presided were too arbitrary and independent, to lay the foundation of any strong system of general law, outside of the departments administered by the consistorial courts. The remedy was found in the centralization of justice brought about in 1532 by the creation by statute of the Court of Session, in which one half of the regular judges were laymen trained in the law, and the

New
influences
at work.

Roman law
came in like
a flood in
sixteenth
century.

Weakness
of local
courts.

Centrali-
zation of
justice —
Court of
Session.

¹ Erskine, *Principles of the Law of Scotland*, 19th ed. (Rankine), p. 5.

Skene's
complaint.

Roman law
as "the
common
law."

Recognized
in Treaty
of Union.

other half clerics.¹ From the scanty fragments of native law the newly born legal profession naturally turned to the principles of Roman law already dominant in the Continental universities wherein, notably at Paris, Scotch colleges were founded.² Toward the end of the sixteenth century Sir John Skene, the collector of *Regiam Majestatem*, complained that "those who are in daily practice in the courts consume their days and nights in learning the civil law of the Romans, and give their whole labors to the practicing of it; and — neglecting the laws of their fathers — hold in no esteem the law of Scotland, which ought to be their first care." After the Reformation the canon law was discredited by a statute rescinding such of its provisions as were repugnant to Protestant doctrine.³ With its one rival thus disabled the triumph of the Roman civil law was so complete that it was often referred to as "the common law" in the statutes.⁴ It permeated the law literature of the sixteenth, seventeenth, and eighteenth centuries; it is the dominating influence in the works of Sir George Mackenzie, Lord Bankton, Lord Stair, and Mr. Erskine; no one can be admitted to the Faculty of Advocates, a body from which the judges of the Supreme Court are usually selected, without undergoing an examination in both systems. By an express article of the Treaty of Union, no one, not an advocate, can be appointed judge of the Court of Session without passing an examination in Roman law. No more conclusive evidence is to be found

¹ Originally seven churchmen, seven laymen, and a president, whom it behooved to be a prelate.

² "The Reformation, and the leading part taken in it by Dutch divines, had attracted many Scotch students to Holland. They, on their return, carried with them the works of Voet, which Scotch lawyers soon came to regard as having great weight in interpreting the principles of Roman law. . . . Voet is still a leading authority in the Scotch Courts." Nathan, *Common Law of South Africa*, i. 19.

³ From that time the canon law has been little respected, except in questions of tithes, patronages, and some few more articles of ecclesiastical right.

⁴ 1540, c. 69; 1585, c. 18; 1540, c. 80; 1551, c. 22.

of the extent to which Roman law has molded that of Scotland than such as is contained in Morrison's Dictionary of Decisions.¹ And yet the fact must be noted that from the commencement of the Court of Session — Scotland in this respect following the practice of England rather than of the Continent — the judgments of that tribunal have been recognized as authoritative precedents. Thus Scotch law, though constructed in the main of Roman materials, has gradually acquired an independent character and strength of its own, which is enabling it to solve most questions without the necessity of a direct recourse to the *Corpus Juris*. During the nineteenth century a decided tendency manifested itself to substitute the influence of English law for that of Roman, especially in cases on commercial law and on questions of interpretation, through a resort to the analogies supplied by the law of England, and to the precedents supplied by the English court of equity.

Force of
precedents.

English
influences in
nineteenth
century.

¹ In the Court of Session, 27 vols. (1532-1816).

PART II

ANALYTICAL

CHAPTER VII

LAW PROPER OR STATE LAW

1. A deliberate effort has now been made to unfold by the Historical Method the processes through which the aggregate, generally known as government and law, emerged from progressive history in those nations which have made the deepest impress upon civilization. The task remains so to analyze that aggregate as to make possible a classification and definition of the elements that compose it. Nothing is more misleading or unfruitful than attempts to elaborate by an *a priori* process the inherent nature of rights and law, while rejecting the fact that political and legal institutions can best be studied, not as arbitrary or imaginary combinations, but rather as belonging to societies of definite historical types. Until we first ascertain how government and law grew, it is impossible to understand what it is. As this work rests upon the assumption that the Science of Jurisprudence is concerned only with positive law, or with law strictly so called, an effort was made at the outset to mark the boundary line that divides that kind of law from the mass of things to which common speech gives the name of law, — such as the so-called laws of fashion, of honor, of morality, and of nature; or such rules as are imposed, or supposed to be imposed, by God or Gods, and generally known as divine laws. “Positive [laws] are those which have not been from eternity; but have been made Lawes by the Will of those that have had the Sovereign power over others.”¹ Or to pass from Hobbes to

Law proper
or state law
defined.

Jurispru-
dence con-
cerned only
with posi-
tive law.

Hobbes's
definition.

¹ *Leviathan*, p. 148.

Austin's.

The word
"com-
mand" the
key.

State as
ultimate
source of
law.

Law proper
should be
termed
state law
rather than
municipal.

Austin: "The matter of jurisprudence is positive law: law simply and strictly so called: or law set by political superiors to political inferiors."¹ Every positive law is "set by a sovereign person or sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or superior." The word "command" is the key to such an analysis of law. A law properly so called is a "command" from a sovereign, an order issued by a superior to an inferior, and "the party to whom it is directed is liable to evil from the other, in case he comply not with the desire." The most striking quality of law proper is its coercive character. Thus we arrive at the conclusions: (1) that the sovereign authority of the state is the ultimate source of all laws and legal institutions as they exist; (2) that a positive law, or a law properly so called, is a general rule of external human action enforced by such a sovereign political authority. No matter what the source or quality of such a law may be, whether statutory, judge-made, or customary, if it is a general rule of external human action enforced by a sovereign political authority known as the state, it is a law properly so called. Law proper should therefore be termed state law rather than municipal for the reason that that term has lost its original meaning with the extinction of the city-state system out of which it arose. Blackstone, who did much to fasten that misleading term upon the English-speaking world, makes this apology for its use: "I call it *municipal law*, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium*, or free town, yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws and customs."² Commenting on that statement, Bentham has said, "The term

¹ "The Province of Jurisprudence Determined," lecture 1.

² *Comm. Int.*, § 2.

municipal [for local or provincial law] seems to answer the purpose very well till it was taken by an English author of the first eminence to signify internal law in general, in contradistinction to international law, and the imaginary law of nature."¹ All confusion vanishes the moment the term "municipal law" is confined to its proper domain as a description of the local or provincial law of a state as contradistinguished from its general law, which should be known by its real name — state law. In states as now organized the term "municipal law" should be confined to the local codes of town or city corporations.

How the latter term should be limited.

2. If it be true that law proper is such only when it is enforceable as a command emanating from the corporate person of the state, acting through that organ in which the sovereign power is vested, it follows that the state, as a living and growing organism, should be so analyzed by the jurist as to lay bare all of its organs and their functions. The process has been drawn out already through which the ancient conception of the state as the city-commonwealth was superseded by the modern conception of the state as the nation, occupying a definite area of territory with fixed geographical boundaries, — the state as known to that set of understandings now called international law.² The normal international corporate person, recognized as a member of the family of nations, enjoys full external sovereignty. The international system rests upon two assumptions: first, that each state is sovereign and independent, and as such coequal with all the rest; second, that territory and jurisdiction are coextensive.³ In that way every state possesses two kinds of sovereignty: first, an external sovereignty consisting of its right as an independent political community to deal with all others of its class upon equal terms under the rules of inter-

The state and its internal sovereignty.

Internal and external sovereignty contrasted.

¹ *Introduction to Morals and Legislation*, xvii. 26, n.

² See above, pp. 17 sq.

³ Taylor, *International Public Law*, pp. 157, 197.

The state
defined.

Bentham
and the
modern
English
theory.

Constitu-
tions of
single
states as
defined by
Greek phi-
losophers.

national law (*droit public externe*); second, an internal sovereignty, inherent in the people as a whole, whose exercise is vested in its rulers by virtue of its constitutional law (*droit public interne*). While dealing with the internal sovereignty of a state, it is convenient to forget that it has any other; it should then be regarded as an isolated unit, and not as a member of the family of nations. When thus viewed it appears as a permanent association of men, existing for definite ends, and so organized that there is a reciprocity of function and a mutual relation of all the parts to each other and to the whole. It bears a fixed relation to a definite portion of the earth's surface known as its territory, with ascertained geographical limits. It is "self-conscious as exhibited in such phenomena as patriotism, antiquarianism, conservatism, and in a general reverence for the past traditions of the community as an organic whole, as well as in an onward looking toward the future."¹ Bentham, who after a long interval took up the theory of sovereignty where Hobbes had left it, laid the foundation of the modern English theory of the state in this definition of political society as it appears in his *Fragment on Government*:² "When a number of persons (whom we may style subjects) are supposed to be in the habit of paying obedience to a person, or an assemblage of persons, of a known and certain description (whom we may call governor or governors), such persons altogether (subjects and governors) are said to be in a state of political society." When the state is thus viewed, the vital question is as to its form of government as embodied in its constitution and its laws, — a question so dealt with by the Greek philosophers with reference to single states as to leave little to be desired. If a state may be compared to a watch, its outer shell represents the state's political constitution or public law, while its

¹ Amos, *A Systematic View of the Science of Jurisprudence*, p. 72.

² A small book, containing all his leading ideas, which appeared in 1776. Cf. Pollock, *History of the Science of Politics*, pp. 96-99.

inner mechanism represents the state's interior code or private law. The division of all state law into public and private, recognized by the Roman jurists, is at once simple and exhaustive. No matter what the source may be from which law is derived; no matter whether it be customary, judge-made, statutory, or people-made, in the form of a written constitution, it is classified by its subject-matter as public or private. Not until after the state is formed can there be law in the strict sense of the term. Then it is that such rules as receive its sanction and are enforced by it — whether a preëxisting body of customs or judge-made and statutory rules subsequently created — take on the character of laws by reason of their recognition by the state, which recognition may be given tacitly by allowance, or expressly through the legislature or the courts.

Division of state law into public and private.

Legality imparted by state sanction.

3. The oldest form of law is of course custom or usage known at Rome as *jus moribus constitutum*, and in England as "the common law,"¹ which embodies the unwritten but well-known opinions of the community as to social right and wrong. Such customary rules begin as a spontaneous evolution from the popular mind which commits, at the outset, their enforcement to popular opinion, or to the licensed vengeance of injured parties. Such primitive and imperfectly executed morality is transformed into law when, after the organization of the state, it is enforced by its political authority. Thus custom becomes the basis of state law when it satisfies certain requirements, and remains such until it is superseded by judge-made or statutory law. In dealing with the evolution of Roman law, the process was drawn out through which the unwritten customs of the Roman people were condensed into the rigid formulas known as the Twelve Tables, subsequently expanded and adapted to the ever changing wants of a growing nationality through three agencies, — legal fictions, equity,

Three, and only three, sources of law.

Origin of custom or usage.

When it becomes the basis of state law.

Customary law at Rome and in England.

¹ See Maitland, in *English Historical Review*, xi. 448.

Its affinity
with reli-
gion and
theology.

Their abid-
ing influ-
ence.

or judge-made law, and statutory legislation. An account was then given of the almost identical process as it was repeated, although with greater difficulty, in England, where, as at Rome, there was a clear recognition of the fact, declared by Justinian in his Institutes, that "long-standing customs, approved by the consent of those who practiced them, take the place of law."¹ Law, which everywhere begins with custom, is usually found in close affinity with religion and theology when they begin to emerge from the superstitions of the savage state, and when custom, already settled, and growing more complex with the progress of culture, has enabled civil society to organize itself into institutions. On the one hand, to take vengeance for the killing of a near relative is the duty a pious son or brother owes to the ghost of the slain; while, on the other, the homicide has created a legal right the enforcement of which, by compelling the payment of the usual compensation to be exacted of the slayer or his family group, will also satisfy the religious obligation.² As conceived of by the Greeks, law was something "to which all men ought to yield obedience for many reasons, and especially because every law is a discovery and gift of God,³ and at the same time a decision of wise men"; while at Rome it was committed at the outset, as heretofore pointed out, to the special keeping of the pontifical college.⁴ Thus it was that primitive custom while being transformed into law passed through the filter beds of religion and theology, whose impress was profound and abiding. As custom or usage was the laboratory in which inchoate law was manufactured prior to the organization of the state, to that laboratory we must look for the special group of circumstances through which any particular customary

¹ Inst. 1. 2. 9. "Diuturni mores consensu utentium comprobati legem imitantur." Cf. Code, 8. 53. 3.

² Cf. Bryce, *Studies in History and Jurisprudence*, p. 640.

³ Demosthenes, *Adv. Aristogeit.* (p. 774); *Dig.* 1. 3. 2.

⁴ See above, pp. 93 sq.

rule was prepared for adoption as positive or state law. Thus the people are in the first instance the direct makers of law; it is an aspect of the total common life of the nation; the people, as Savigny has expressed it, is always the true legislator: *Das Gesetz ist das Organ des Volksrechts*. Law is begotten in the people (*volk*) by the popular intelligence (*Volksgeist*).¹ At the outset the people speak the law. In the English as in the Frankish hundredmoots the law was declared, not by any judicial officer, but by the whole body of freemen present, represented in later times by the *Rachimburgi*, the *Schöffen*, and the grand jury.²

The people
as makers
of law.

The German theory of the unconscious creation of customary rules of conduct, which come into existence, bit by bit, as the natural wants of mankind demand them, must be tempered by the fact that society when organized as the state reserves to itself the right to continue in force only such of them as it deems "reasonable,"³ that is, adapted to its circumstances. Thus as civilization advances and as the primitive rules become less and less applicable to new conditions, the archaic code of customary law loses its importance relatively to other kinds of law. When the old rules become too narrow, an agency must be found which, without appearing to disregard them, can build up alongside of them a new body of rules capable of supplementing or overriding them. In that way the popular conscience is superseded by the judicial conscience vested in the magistrate armed by the state with the power of judicial legislation. Deliberate consideration has heretofore been given, as a comparative study, to the two

Recognition
of custom-
ary rules
by state
authority.

Popular
conscience
superseded
by judicial
conscience.

¹ *System*, i. 175, 177. Apart from its bodily form, the state, the people has, however, no actual existence. *Ibid.* i. 22.

² Waitz, iii. 487; iv. 325; Taylor, *The Origin and Growth of the English Constitution*, i. 304. How near the system of delegation as practiced in the English popular courts ever approached the Frankish *Schöffen* system is a question which has been often suggested but never distinctly answered. Cf. *North American Review*, July, 1874, cexliv. 243.

³ "Malus usus est abolendus." Co. Litt., s. 212.

The praetor and the perpetual edict.

Jus honorarium the pupil of *jus civile*.

The chancellor and his equitable jurisdiction.

great historical illustrations of that process as worked out by the praetor at Rome and by the chancellor in England. While the former was without any express authority to legislate he exerted, during his year of office, a power over all judicial process which finally became almost unlimited. In the perpetual edict he gave notice, upon entering upon his term, of the modes in which he purposed to give relief against the inconveniences of the established system, which was treated with the greatest deference. It remained as a standard for imitation. The *jus honorarium*, into which was condensed the practical devices invented by the praetor, was in theory a mere pupil of the older *jus civile*,—"equity follows the law,"—" *jus praetorium, quod jus civile subsequitur.*"¹ Or as Papinian has expressed it, "*Jus praetorium est quod praetores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam.*"² Thus alongside of the archaic system was built up at Rome a set of judge-made rules that gave an effect to contracts not to be found in the limited list of those recognized by law, and to wills neither sanctioned by the *comitia* nor solemnized by a sale of the inheritance with copper and scales, while the benefits of succession *ab intestato*, which still passed by law to the artificial "agnatic" group, were practically secured to the blood relations.³ To the English chancellor, as keeper of the king's conscience, was committed that undefined residuum of judicial authority attributed in early times to an English king. From that source was drawn the chancellor's equitable jurisdiction, defined to be "the extraordinary interference of the chancellor, without common law process, or regard to common law rules of proceeding, upon the petition of the party aggrieved, who was without adequate remedy in a

¹ *Dig.* 22. 5. 14.

² *Ibid.* 1. I. 7.

³ "Naturali aequitate motus proconsul omnibus cognatis promittit bonorum possessionem, quos sanguinis ratio vocat ad hereditatem." *Dig.* 38. 8. 2.

court of common law.”¹ In exercising that power Lord Cottenham said: “I think it is the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence, to decline to administer justice, and to enforce rights for which there is no other remedy.”² Or, in the words of Lord Hardwicke: “When the court finds the rules of law right, it will follow them, but then it will likewise go beyond them.”³ The English chancellors have ever recognized in theory at least the maxim that “equity follows the law”; “the conscience [said Lord Nottingham] by which I am to proceed is merely *civilis et politica*, and tied to certain measures.”⁴ During the long term of Lord Eldon it was that English equity became a body of rules scarcely more elastic than the common law, — a condition reached in the history of Roman equity when in the time of Hadrian the edicts of the praetors were consolidated by Salvius Julianus.⁵ Out of that body of English equity rules thus created arose that method of interference with the process of the common law courts, when it threatened to work injustice, known as “injunctions”; and that vast and complicated system of trusts peculiar to the law of England, which implies nothing more than the recognition of certain new rights and duties beyond and above those defined in the older legal system. Alongside of the doctrine of *bona fides*, as defined by the Roman praetor, may be set that of “conscience” or “equity” as entertained by the English chancellor. Against that point of union must be set, however, the difference that divides the praetorian jurisdiction, — exercised in one court, by one judge, on one trial, under a single system of procedure, — from the two sets of courts of

Cotten-
ham.

Hardwicke.

Notting-
ham.

Eldon.

Doctrine of
bona fides
and “con-
science” or
“equity.”¹ Campbell, *Lives*, i. 7.² Walworth v. Holt, 4 My. and Cr. 635.³ Paget v. Gee, Amb. App. 810.⁴ Cook v. Fountain (1676), 3 Swanst. 600; Holland, *Jurisprudence*, pp. 69-71.⁵ Maine, *Ancient Law*, ch. iii.

Unification
of English
bifurcated
system.

A more
radical
proposal.

English
judge
limited to
concrete
case.

The praetor
spoke gen-
erally.

Bound by
statutes.

equal dignity, continuing side by side for ages, while administering different legal principles, through distinct procedures, and interfering with and controlling each other's free movements. The difficulties and inconveniences incident to such a bifurcated system, common to England and the United States, is now yielding to a hopeful process of unification that proposes not only to allow but to require every judge in every court of justice to recognize the rules belonging to both systems, and to afford to suitors the most appropriate and efficient remedies offered by either system by employing the administrative machinery heretofore assigned to either court to enforce rights owing their origin to either one or the other. A more radical proposal is that which contemplates the ultimate fusion of the two systems into one homogeneous body of law completely reconstructed through codification.

In the English system the judge is never supposed to go beyond the concrete case before him; when he declares the law, it is by passing on the particular question that has arisen between two or more persons, natural or artificial. While he may incidentally discourse generally on the law touching the pending subject, and thus throw off *dictum*, it is only the *ratio decidendi*, often narrowed down to a very fine point, that can be quoted as authority. On the other hand, the praetor spoke generally in the edict issued at the beginning of his term in which he laid down a rule intended to be applicable to a large class of cases. While the Romans said the praetor does not make law (*praetor jus facere non potest*), they called the rules that emanated from him *jura*,¹ while the entire body of such rules was known in later times as *jus honorarium*, *jus praetorium*. Still the praetor always held himself to be bound by statute; and when a particular case was decided in a particular way under a provision of the Edict, which was omitted the next year, it could not be disturbed,

¹ See Cic. *De Invent.* ii. 22.

as the Romans held firmly at the outset to the principle of *stare judicatis*. Cicero enumerates *res judicatae* among the sources of law,¹ and in the interpretation of ambiguous laws the Emperor Severus attributed binding force to the *rerum perpetuo similiter judicatarum auctoritas*.² A contrary principle was, however, established by a Constitution of Justin.³ From that later view was inherited the Continental idea that while previous decisions are instructive, they are not authoritative, as the judgment of one court cannot constrain another to adopt the same view in a similar case. The Codes of Prussia and Austria go so far as to provide expressly that judgments shall not have the force of law.⁴ From the time of the Year Books decided cases have been cited as precedents in England; and so firmly was the rule settled in Blackstone's time that he declared, "the duty of the judge is to abide by former precedents."⁵ After stating that the English courts "are arranged in this respect in a regular hierarchy, those of each grade being bound by the decisions of those of the same or a higher grade, while the House of Lords is bound by its own decisions," Holland says, "This is not the case in the Privy Council, or in the Supreme Court of the United States."⁶ The justices of that court would no doubt stand aghast at that assertion, as its decisions do not permit a question once fully decided in a former case even to be reargued. It has declared that questions repeatedly before it, and decided in the same way, are not open for readjudication.⁷ And yet,

Stare judicatis in early Roman law.

Constitution of Justin.

Decided cases as precedents in England.

In the United States.

¹ *Top.*, c. 5.

² *Dig.* 1. 3. 38.

³ "Nemo iudex vel arbiter existimet neque consultationes quas non rite iudicatas esse putaverit sequendum, et multo magis sententias eminentis simorum praefectorum, vel aliorum procerum; non enim si quid non bene dirimatur, hoc et in aliorum iudicum vitium extendi oportet, cum non exemplis sed legibus iudicandum sit." Code, 7. 45. 13. Cf. *Dig.* 1. 18. 12.

⁴ "Although the Codes of France, Italy, and Belgium are silent on the point, the rule in all these countries is substantially the same." Holland, *Jurisprudence*, p. 65 and notes.

⁵ 1 Comm. 69.

⁶ *Jurisprudence*, p. 66.

⁷ *Wright v. Sill*, 2 Black 544; *Minnesota Mining Co. v. National Mining Co.*, 3 Wall. 332; *United States v. 422 Casks of Wine*, 1 Pet. 547; *Florida Cent. R.R. Co. v. Schulte*, 103 U.S. 118.

Difference
between
theory and
practice.

despite such announcements, in the New World as in the Old, theory is one thing, practice quite another. The old English fiction was that the judges were not to announce any new rules, but to expound old ones to be drawn from an imaginary reservoir in which they were supposed to have been stored from the beginning of time. Austin has well sneered at "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody; existing from eternity and merely declared, from time to time, by the judges."¹ Under cover of that harmless and convenient fiction English judges have

Judge-made
law in
England
and the
United
States.

for centuries been creating new rules for cases not previously provided for. Since its organization the Supreme Court of the United States has been extending the same process, on a far wider scale, for the reason that the demand upon it for the creation of new rules has been far greater than upon the courts at Westminster. By the force of judicial logic alone, unaided by any express constitutional provision, it established its rights to put the stamp of nullity upon any law deemed by it to be in conflict with the national constitution. Not until thirteen years after its organization did it declare that it possessed the power to put the stamp of nullity on a national law;² not until twenty years after its organization did it actually put the stamp of nullity on a state law.³ When by the application of steam to navigation a revolution was wrought in the commerce of the country, a notable legal result of the change was a substitution for the ancient English rule of admiralty jurisdiction, resting on the ebb and flow of the tide, of a new one better adapted to totally different physical conditions. In Taney's time the navigable character of the water, an entirely new rule, was made the test; and thus by the silent stroke of the judicial pen the admiralty

¹ *Lectures*, ii. 655.

² *Marbury v. Madison* (1803), 1 Cranch 138.

³ *Fletcher v. Peck* (1810), 6 Cranch 87.

jurisdiction of the federal courts was extended not only beyond the ebb and flow of the tide in all public navigable waters, but over the great fresh-water lakes as well, inland seas upon which fleets have encountered.¹ With these facts, so emphatically illustrating the law of growth, clearly in view, it is easy to understand how, through the agency of judicial interpretation, supplemented to some extent by statutory legislation, the jurisdiction of the court as a whole has been developed and defined while being applied to the manifold subjects of federal cognizance upon which it has been adjudicating for more than a century. When the intricacy and delicacy of the task is duly considered, nothing can be more apparent to the scientific jurist than the fact that it could only have been performed through the agency of judge-made law, — that agency which silently expanded and adapted, as we have seen, the primitive and unelastic Codes of Rome and England, to the ever increasing wants of progressive societies. When viewed in the light of its history as illustrated by those codes, there is no reason to apprehend that that kind of law may eventually undermine the constitution of the American commonwealth. On the contrary, there is every reason to believe that without the adjusting, defining, and expanding power of judge-made law it would have been impossible to adapt our complicated and rigid system of written constitutions to the new and varied conditions that have so rapidly arisen out of an unparalleled national development.

Develop-
ment of
jurisdiction
of Supreme
Court.

The fact has been heretofore emphasized that in earlier times the jurists were the makers of law, as they were the first repositories and interpreters of those customs out of which law grew. Before the enactment of the Twelve Tables, and even down to the third century B.C., a small patrician body, some of them jurists, retained in their memories and

Jurists as
makers of
private law
in earlier
times.

¹ The *Genesee Chief v. Fitzhugh* (1851), 12 How. 443. Cf. Taylor, *Juri. and Pro. Supreme Court of the United States*, pp. iii-xxvii.

transmitted to their successors customary rules and maxims expressed in carefully phrased and scrupulously guarded formulas. High among such formulas stood the rules, cherished by the class in question as a sacred deposit of political as well as religious importance, which regulated the bringing of actions or other legal proceedings, the slightest verbal deviation from which amounted to a fatal error. Thus in earlier times the entire domain of private law was occupied by the jurists who were the molders of it. As heretofore pointed out, the materials of the human heathen Digest, in which Roman private law was embodied and which has survived as an immortality, were fabricated by the jurists before Roman life was seriously affected either by the Christian religion or by statutory legislation.¹ Such legislation was the last of the three agencies employed at Rome to expand and adapt the archaic code to the ever changing conditions of the aftergrowth. And it may be said generally that remedial equity was everywhere older than remedial legislation. During the Roman Republic the improvement of ordinary private law was for the most part left to the praetor and the jurists. When the Roman popular assemblies died out, without being formally abolished, the power of direct legislation passed to the senate, which, at the very moment it won full recognition as an organ of legislation, became the mere tool of the emperor for that purpose. The final form of direct Roman legislation is that of imperial ordinance, the outcome of the imperial function ascribed in later times to a formal transfer made to the emperor by the people of their own authority.² It was legislation of that type that gave to the Roman law the shape in which it

Remedial
equity
everywhere
older than
remedial
legislation.

Direct
Roman
legislation.

¹ See above, p. 144.

² Cf. Just., *Inst.* 1. 2. 6; cf. *Dig.* 1. 4. 1. The emperor did not, however, legislate as an assignee of the popular power of legislation. His legislative function sprang from his authority as a magistrate. The edicts of the magistrate were the real prototypes of the imperial constitutions.

descended to the modern world in the East and West. The *constitutio generalis*¹ represents the true type of the imperial law; through its agency the ancient traditional law (*jus vetus*) was, during an interval of over two centuries (from Diocletian and Constantine to Justinian), subjected to a continuous process of refinement at the hands of successive emperors until perfect unity and harmony prevailed. When we turn from Rome to England we find that the earlier system was there slowly molded through usage and by the courts themselves, — the functions of the chancellor like those of the praetor were offspring of custom and not of statute. It is only the later system, built up out of the customs of the thirteenth century, that has been seriously affected by direct legislation. Not until the latter part of that century did the English Parliament as an organ of legislation assume its final form under Edward I., whose influence on a series of remarkable legislative enactments, defining and amending the common law, won for him the imposing title of the English Justinian. But long before the organizing and defining hand of Edward was applied to the task of reducing through the agency of direct legislation the body of the customary law, as modified by the innovations to which the Conquest had given birth, to system and order, two great text writers, Glanvill² and Bracton, had been smoothing the path before him. The great work of the latter, which even in Coke's time was looked to as the highest source from which a knowledge of the common law could be drawn, is a comprehensive statement of the whole law of England as it stood when the reign of Edward I. began. Bracton's wonderful familiarity with the imperial and pontifical jurispru-

Direct Eng-
lish legisla-
tion.

Glanvill
and
Bracton.

¹ "Constitutio est quod imperator constituit."

² *Tractatus de Legibus et Consuetudinibus Regni Angliae*, which consists of fourteen books, is chiefly a treatise on the forms of procedure in the *curia regis*. As to the writ process in the time of Glanvill, see Bigelow, *Anglo-Norm.*, *Introduction*, p. xxvi; *Register of Original Writs*, by F. W. Maitland, 3 *Harvard Law Review*, 107.

dence, which had already been introduced to some extent into the English system by the clerical judges, is manifest not only from his frequent quotations from the Digest, Institutes, and Code of Justinian, but also from his use of maxims and definitions drawn from Roman sources.¹ The tendency thus exhibited by Bracton to enrich the common law by principles and definitions borrowed from the revived Roman jurisprudence was followed by Edward, who was careful to secure the services of the civilian, Francesco Accursi of Bologna, before entering upon the work of legislative reform.² It is certainly interesting to note this manifestation of Roman influence just at the moment when English private law — a growth of ages which had been systematized somewhat by the text writers and the judges — was for the first time touched by the organizing hand of a scientific legislator. Except, perhaps, in their brevity the Roman statutes of the Republic were not superior to the English statutes down to the time of George III. The two systems moved on along the same lines. As time and change went on the two bodies of law, which jurists, magistrates, and judges had built up out of materials provided by custom, were subjected, as occasion required, to the defining and amending hand of direct legislation. When the mass of Roman law, old and new, became so unwieldy as to be unmanageable, a remedy was found in codification, a process rejected, until very recent years, by English legislation. Something, however, was accomplished by the Judicature Act of 1873, whereby the doctrines of the chancellors were adopted into the body of the law of England, as the work of the

Accursi of
Bologna.

Roman and
English
statutes
contrasted.

Codification
at Rome
and in
England.

¹ Cf. *Henricus de Bracton und sein Verhältniss zum Römischen Rechte*, by Dr. Carl Gütenbock, Berlin, 1862, translated by Coxe, Philadelphia, 1866.

² He was in attendance upon the Parliament of 1276. Statutes of the Realm, i. 42. "Francesco was in attendance on Edward at Limoges in May, 1274, *Foedera*, i. 511, 512." Stubbs, *Constitutional History*, ii. 107, note 2. He was the son of the great Accursi of Bologna, who was the writer of the glosses on the civil law.

praetors was finally adopted into the body of Roman law by the legislation of Justinian. And an attempt has been made to reduce English statute law — more bulky and more unscientific in form than Roman at the time Justinian undertook to rescue it from chaos — into a more manageable mass, through the labors of the Statute Law Commission, lately superseded by the Statute Law Committee, under whose auspices a general revision of the statutes is now being conducted.¹ In the United States a more deliberate effort has been made to subject English law, with the amendments it has received here, to codification. In nearly all of the states of the Union carefully prepared codes have appeared in which is restated, on the Roman plan, in titles, chapters, and sections, the entire body of law of the particular state, resting everywhere, except in Louisiana, upon an English basis. The construction of the manifold sections of such codes constitutes a large part of the judicial work of the supreme courts of the several states. In the course of years certain sections of special importance almost disappear under the mass of adjudications to which they give rise. When at stated intervals a code, which has been subjected to such a process of construction, is revised, the judge-made law that has grown up around it is codified, and thus reappears as statute law. And so must ever go on the process of growth and adaptation in which the judge has the last word, — the ancient nucleus of light remains unimpaired.

Codification
in the
United
States.

From what had now been said it appears that there have never been but three sources or laboratories in which law has been fabricated, — custom or usage, judge-made law, and statutory legislation. Over-refinement may create artificial subdivisions until the catalogue is a long one, but all such subdivisions are at once reducible to the three heads named

Difference
between the
fabrication
of a rule
and its
adoption.

¹ For a mass of historical facts and acute criticism as to modern English legislation, see Sir C. P. Ilbert, *Legislative Methods and Forms*.

State recog-
nition of a
custom.

above. And here it is all-important to keep steadily in view the fact that the fabrication of a rule is one thing, its adoption by the state quite another. Austin has well said that while usage may make rules, it cannot, without obtaining for them the recognition of the state, make laws. According to his view the state's recognition must be dated from the moment that the usage has been called in question and allowed to be good in a court of justice. In criticising the soundness of that view, Holland justly contends that when a given set of circumstances is brought by the court within the operation of a custom, the court appeals to that custom as it might to any other preëxisting law, and thus decides as a fact that there exists a legal custom, about which there might up to that moment have been some question. The court does not, *proprio motu*, then for the first time make that custom a law, for the reason that from its organization the state, by express or tacit recognition, adopts as laws, not only the rules of equity but the entire body of customs that come up to a certain standard of general reception and usefulness, in the absence of any specific rule of written law. It must not be assumed, however, that a custom by being molded into a code is incapable of further growth; it may still be susceptible of even rapid modification.¹ It may be laid down as a general rule that the state has but two articulate organs for law-creating purposes, — the courts and the legislature. Through the action of the first it attests and affirms old law, while amending and modifying it by the introduction of new principles which the judges are continually fabricating, and which have the force of law from the time of their formal announcement. Through the action of the second it makes new law, fabricated

A state has
but two
articulate
organs of
legislation.

¹ In *Goodwin v. Roberts*, L.R. 10 Ex. 337, the "custom of merchants," once supposed to be incapable of further growth, was recognized as being susceptible of even rapid modification. In *Edelstein v. Schuler & Co.*, 2 K.B. 144, it was said that "the law merchant is not fixed and stereotyped. It has not been arrested in its growth by being molded into a code." Holland, *Jurisprudence*, pp. 58-60.

by the legislature itself, which takes effect from the time fixed by general constitutional or statutory provision, or by the terms of the particular act. Statutory legislation may proceed from the supreme political authority, whether an autocrat, like the Roman emperor or the Russian Czar, or from a sovereign parliament; or it may proceed from subordinate legislatures or authorities possessing delegated legislative authority whose limits cannot be exceeded.¹

Subordinate legislatures.

4. Before attempting to define either the immediate or remote objects of law, it will be helpful to review the more important statements that have been made on that subject by philosophers and jurists, German and English. According to Kant, law is "the totality of the conditions under which the free will of one man can be united with the free will of another, in accordance with a general law of freedom";² according to Savigny, it is "the rule that determines the invisible limit within which the existence and activity of each individual may obtain secure and free play."³ In contrast with that purely negative conception, which makes the function of law to be the preservation of the freedom of the will from interference, must be placed the views of the school, represented by Krause⁴ and Ahrens,⁵ who contend that the human race can only realize the highest good of which it is capable when the pursuit of the highest good of the individual and society is regulated and controlled by law, applied by the organization we call the state. In general harmony with that idea are the more precise and simple statements of Bacon⁶ and Locke,⁷—the former saying, "*Finis et scopus quem leges*

Law as the creator and preserver of legal rights.

Kant.

Savigny.

Krause and Ahrens.

Bacon and Locke.

¹ As to the relation of such subordinate legislative bodies to the courts and to the supreme legislature, see Bryce, *American Commonwealth*, vol. i., ch. 23; Dicey, *The Law of the Constitution*, ch. 3; Cooley, *Constitutional Limitations*, ch. viii.

² *Rechtslehre, Werke*, vii. 27.

³ *System*, i. 114.

⁴ *Abriss des Systemes der Philosophie des Rechtes*, 1828.

⁵ *Cours de droit naturel*, 1840.

⁶ *De Aug.*, lib. viii., aph. 5.

⁷ *Of Civil Government*, i., § 57.

intueri, atque ad quem iussiones et sanctiones suas dirigere debent, non alius est quam ut cives feliciter degant;" the latter, "Law, in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no further than is for the general good of those under the law . . . so that, however it may be mistaken, the end of the law is, not to abolish or restrain, but to preserve and enlarge freedom." Hobbes¹ in his crabbed way says that "law was brought into the world for nothing else, but to limit the natural liberty of particular men, in such manner, as they might not hurt, but assist one another, and joyn together against a common enemy"; while Bentham² declares, "Of the substantive branch of the law the only defensible object or end in view is the maximization of the happiness of the greatest number of the members of the community in question." As all such definitions of law presuppose the existence of the state, it is easy to understand Herbert Spencer³ when he says, "Thus the belief in an unchanging order — the belief in law, now spreading among the more cultivated throughout the civilized world — is a belief of which the primitive man is absolutely incapable." Amos has well said: "Now the existence of any kind of government, even of the most inartificial and primitive, involves the presence of law just as much as law involves that of government. Law and government are born together, grow together, and die together."⁴ After disposing of the ultimate object of law with the declaration that it "is something more than police. Its ultimate object is no doubt nothing less than the highest well-being of society," Holland, with his unerring insight, touches the practical side of the question when he says: "Jurisprudence is concerned not so much with the purposes which law subserves, as with the means by which it

¹ *Leviathan*, p. 138.² *Works*, ii. 6.³ *Principles of Psychology*, § 488.⁴ *A Systematic View of the Science of Jurisprudence*, p. 2.

subserve them. The purposes of law are its remote objects. The means by which it effects those purposes are its immediate objects. The immediate objects of law are the creation and protection of legal rights.”¹ The four cardinal conceptions with which the student of jurisprudence has ever to deal are (1) the state; (2) law; (3) rights; (4) duties. The state may be defined to be a corporate person, constituted by the permanent aggregation of an indefinite number of human beings, occupying a definite portion of the earth’s surface, whose internal sovereignty is regulated and limited by its own constitution, while its external sovereignty is limited by international law.

Four cardinal conceptions; the state defined.

As the sovereign authority of the state is the ultimate source of all laws and legal institutions as they exist, positive law, or law properly so called, may be defined to be a general rule of external human action enforced by such a sovereign political authority, with the immediate object of creating and protecting legal rights.

Positive law defined.

A legal right thus created and protected may be defined to be that which any one is entitled to have or to do, or to require from others, within the limits prescribed by law; or, in other words, a right is a legally protected interest. That which gives validity to a legal right is, in every case, the force imparted to it by the state. Every right necessarily presupposes a corresponding duty for the reason that it implies the active or passive furtherance by others of the wishes of the party having the right. The capacity of control over the acts of another person, thus given by state law, is said to be a right, while the corresponding liability of the other person to have his acts so controlled is said to be a duty. In that way the sphere of action of one set of individuals in the state is enlarged precisely to the same extent that that of another set is restricted. If, despite every consideration of moral

Legal rights defined.

Legal duties defined.

¹ *Jurisprudence*, p. 77. See also pp. 75-76.

No matter how iniquitous a positive law may be.

Moral and legal rights distinguished.

Sommersett's case.

Mansfield's definition of positive law.

justice, a positive law gives to one person the power of depriving another of the ownership of a certain piece of land, the right of the new occupant to possession, and the duty of the prior occupant to yield possession, will be recognized by every court having jurisdiction of the subject. No matter how iniquitous or unpolitic the law in question may be, the legal right vested by it will be as perfect as if the law was the product of the highest wisdom and justice, and any one interfering with the transfer of the possession under it will be liable to penalties, either civil or criminal, or both. It is all important for the jurist sharply to distinguish between a legal right or capacity vested in one person of controlling, with the assent and assistance of the state, the acts of others, and a moral right depending entirely for its enforcement upon the moral coercion of public opinion. While legal rights have the objective support of the physical power of the state, moral rights have, in general, only a subjective support. A typical illustration of the distinction is to be found in the case of the negro slave, *Sommersett*, who, in 1771, was confined in irons on board of a ship in the Thames bound for Jamaica. Stewart, who claimed to be his master, based his right to hold him upon the theory that the positive law of England recognized and upheld slavery. Lord Mansfield, in delivering the captive, on habeas corpus, said: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, are erased from memory. It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow upon the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."¹ The moment the objective support of

¹ 20 St. Tr. 1; 12 Geo. III., 1771-1772. Reported as *Somerset v. Stewart*, Lofft 1.

the physical power of the state was thus withdrawn through the judicial ascertainment that slavery was not upheld by the positive law of England, the possibility of one man holding another in bondage ended. In the light of what has now been said as to the immediate and remote objects of law the statement may be made (1) that its immediate object is the creation and protection of rights; (2) that it defines the rights it so creates and protects; (3) that it specifies the mode in which it will aid or protect them. That part of the law which creates or defines rights is "substantive law"; that part which aids or protects them is "adjective law," or procedure. Clearly marked and familiar as that distinction is to the modern mind, it is of comparatively recent origin. In early stages of legal growth the two elements are inseparable; indeed, substantive law is born of procedure, being secreted, as has been said, in the interstices of form,¹ — the very term "adjective law" was first used by Bentham. "Bracton has fifty times as much on actions as he has on the law of persons, and it is under this head that we must search in his pages for much of what we now call substantive law. The close association thus observed between pure legal doctrine and matter of procedure is characteristic of all early law."²

"Substantive law" and "adjective law."

5. Far more ancient, and certainly more radical, is the division of law into public and private, a division arising out of the character of the persons with whom a right is connected. When both of the persons with whom the right is connected are private persons, the law regulating such a right is "private" law. When one of the persons with whom a right is connected is the state and the other a private person, the right is public, and the law regulating such a right is "public" law. That comprehensive division, which embraces the

Division of law proper into private and public.

¹ Maine, *Early Law and Custom*, p. 389.

² Street, *Foundations of Legal Liability*, iii. 1.

Recognized
by Aris-
totle.

entire field of law, was distinctly recognized by Aristotle, who, in classifying offenses according to those against whom they are committed, said they are committed either against the state (τὸ κοινόν), or an individual (ἕνα τῶν κοινωνούντων).¹

Restated by
Roman
jurists.

That vitally important distinction between public and private persons resulting, through the severance of public and private rights, in the opposition between public and private law, was seized upon and restated by the Romans, from whom it was borrowed by most of the continental nations as the fundamental basis of legal division. In the words of Ulpian, adopted by Justinian, "*Publicum jus est quod ad statum rei Romanae spectat; privatum quod ad singulorum utilitatem pertinet.*"² In the words of Paulus, "*Alterum utilitas privatorum, alterum vigor publicae disciplinae pos- tulat.*"³ Holland, after combating in a masterful way

Holland's
statement.

Austin's attempt to divide "primarily the whole field of law into the law 'of Persons' and that 'of Things,' subordinating to the law of Persons the mighty cleavage between Public and Private law," thus concludes: "In Private law, where all the characteristics of law are fully present, the law of Persons is, as we have already described, a statement of the ways in which the general law is modified by varieties of status; while the law of Things is a description of the various kinds of rights enjoyed in private capacities by persons as being within the jurisdiction of a State, but not as being in any way representative of the sovereign power in the State. In Public law, which, as we have seen, possesses the characteristics of law in a lower degree of development, the distinction is but faintly traceable. What is analogous to the law of Persons here consists in a description of the state as a whole, of its ruling body, of bodies or persons enjoying delegated ruling

¹ *Rhet.* i., c. 13. An assault is an injury to an individual; failure to perform military service is an injury to the state.

² *Dig.* 1. i. 1; *Inst.* 1. 1. 4.

³ *Dig.* 39. iv. 9. 5; cf. *Cod.* 1. 2. 23.

power, and of its constituent members as such; in short, in what is usually known as 'constitutional' law."¹ According to that view, herein adopted without reservation, "The field of law, strictly so called, may be thus exhaustively divided between the law which regulates rights between subject and subject (*civis* and *civis*) and that which regulates rights between the state and its subjects (*civitas* and *civis*)." The private person thus referred to must be understood to be an individual, or a collection of individuals however large, who, or each one of whom, is of course a unit in the state, but in no sense a representative of it, even for a special purpose. The public person thus referred to must be understood to be either the state, or the sovereign part of it, or a body or individual holding delegated authority under it. Upon the basis of that division the law of contracts, of real and personal property, of wills and succession and of torts may be arranged in one group, and constitutional, ecclesiastical, criminal, and administrative law in another, while to the one or the other every possible legal topic may be readily assigned. And here the fact should be emphasized that the same act may often violate both a private and a public right. A libel upon an individual or an assault is a violation of two distinct rights: first, of the private right of the individual to be unmolested; second, of the public right of the state not to be disturbed by acts constituting, or tending toward, breaches of the peace. The same set of circumstances may thus, from one point of view, constitute a tort, while from another point of view they may constitute a crime. The unsound and superficial view that a difference between a tort and a crime is simply a matter of procedure is exposed by Blackstone,² who, looking deeper, says that torts are an "infringement or privation of the private, or civil, rights belonging to individuals, considered as

Private
person
defined.

Public
person
defined.

Classifica-
tion of law.

Same act
may vio-
late public
and private
right.

Difference
between a
tort and a
crime.

¹ *Jurisprudence*, pp. 124, 127, 138, 139.

² See *Quinn v. Leathem* (1901), A. C., at p. 542.

individuals; crimes are a breach of public rights and duties which affect the whole community, considered as a community." Or, as a recent American writer, in distinguishing crimes from torts, has stated it: "First, it is to be observed that no wrong whatever constitutes a tort unless the common law courts, in the exercise of their ordinary powers, have jurisdiction to entertain a civil suit for damages based thereon. Neither spiritual offenses, nor crimes, nor violations of those equitable rights which are the subject of exclusive equity jurisdiction, constitute torts in the sense of the common law."¹

Private
only
typically
perfect
law.

Sovereign's
rights and
duties.

In English
system.

When it is remembered that law strictly so called is only such law as is enforced by the political arbiter known as the state, it follows that private law is in the strictest sense the only typically perfect law, because both the parties concerned in its enforcement are private individuals, above and between whom the state stands as an impartial and final judge. That perfect conception of law proper is somewhat confused when public law is to be enforced for the reason that, in that event, the state is present not only as an arbiter but as one of the parties interested, directly or indirectly. Here the power which defines and protects the right is itself a party interested in or affected by the right. It cannot be denied that the sovereign may be clothed with a right² when we look to the form of an indictment which in England runs, "The King on the prosecution of A. B. against C. D."; in the United States, "The state (or the People) against E. F." And in the same way in which the state possesses rights, it is also charged with duties which it may either repudiate, or enforce according to legal forms and definitions it voluntarily prescribes or recognizes.³ In England such duties are usually enforced

¹ Street, *Foundations of Legal Liability*, i. xxviii.

² "Inter subditos et Rempubicam obligationes non minus quam inter homines singulos contingunt." Zouche, *Elementa Jurisprudentiae*, iv. § viii.

³ For Ihering's view on that subject, see *Der Zweck im Recht*, i. 344, 366; for Holland's view, see *Jurisprudence*, p. 126.

by a Petition of Right¹ which, after being lodged with the Home Secretary and after due investigation, receives, in proper cases, the royal fiat, "Let right be done." By the constitution of the United States, it is expressly provided that a state may sue or be sued by another state in the Supreme Court in the special and limited cases defined therein. In *Rhode Island v. Massachusetts*² it was said that "as this court is one of limited and special jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act; and proceeding without the limits prescribed is *coram non judice*, and its action a nullity (10 Pet. 474; S. P. 4 Russ. 415). And whether the want or excess of power is objected to by a party, or is apparent to the court, it must surcease its action or proceed extrajudicially." For that reason the court has declined to take jurisdiction of suits between states to compel the performance of obligations which, if the states had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Originally a state was suable in the Supreme Court by a citizen of another state, but that right was extinguished by the Eleventh Amendment, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." It is now settled that under certain circumstances a state may be sued by the United States,³ whose government has been most careful to provide for its own accountability to private individuals. On February 24, 1855, Congress passed an act

In American system.

No jurisdiction where obligation is political.

¹ Cf. Broom, *Constitutional Law*, pp. 203 sq. It does not lie for a tortious act by servants of the crown. *Tobin v. The Queen*, 16 C. B. N. S. 310.

² 12 Pet. 720.

³ See Taylor, *Jurisdiction and Procedure of the Supreme Court of the United States*, ch. ii., "When a state may sue"; ch. iii., "When a state may be sued."

The court
of claims.

entitled "An Act to Establish a Court for the Investigation of Claims against the United States" ¹ which has been made a permanent institution. Of the court as finally constituted a great American lawyer ² said that it is the first born of a new judicial era. As a judicial tribunal, it is not only new in the instance,—it is also new in principle. So far as concerns the power of courts to afford redress, it has heretofore been fundamental that the sovereign can do no wrong. This court was erected as a practical negative upon that vicious maxim. Henceforth our government repudiates the arrogant assumption, and consents to meet at the bar of enlightened justice every claimant how lowly soever his condition. Prior to the institution of this court all rights as against the nation were imperfect in the legal sense of the term; every duty of the nation was a duty of imperfect obligation. There was no judicial power capable of declaring either; no private person possessed the means of enforcing the one or coercing the other. But effectual progress has been made toward giving form and method to the administration of justice between the nation and the individual. And in order to bring that kind of justice nearer to every citizen Congress granted, by the act of March 3, 1887,³ the right to sue the United States in the district of the plaintiff's residence for certain causes of action arising out of contract. If the cause of action is under one thousand dollars, the district court has jurisdiction, and if it is over one thousand dollars, and does not exceed ten thousand dollars, the circuit court has jurisdiction, and both courts in such cases have concurrent jurisdiction with the court of claims. Thus was completed the most advanced system, so far devised in

Jurisdiction
localized.

¹ 10 *Stat. at L.* 612, c. 122.

² Charles O'Connor, of New York. The speech is reported in full in a volume entitled *Great Speeches by Great Lawyers*, Baker, Voorhis & Co.

³ Known as the "Tucker Act," 24 *Stat. at L.* 503, c. 359. Cf. Hughes, *Federal Procedure*, pp. 161 sq.

the world's history, for the administration of justice between the individual and a sovereign state of which he is a member. From what has now been said as to the division of law proper or state law into public and private, it clearly appears that such is the most ancient and radical division, a division arising out of the character of the persons with whom a right is connected. When both persons with whom a right is connected are private persons, the law regulating such a right is "private" law; when one of the persons with whom a right is connected is the state and the other a private person, the right is public, and the law regulating such a right is "public" law. As legal development advanced, each of these grand divisions was subdivided into "substantive" and "adjective" law, two elements which in the early stages of legal growth were inseparable. To the mind of the modern jurist the divisions and subdivisions of law proper or state law should thus appear:

Division of
law into
public and
private
more
ancient

than division into
"substantive" and
"adjective."

Private law is either "substantive" or "adjective," — the former creating and defining the rights of individuals, the latter indicating the procedure or remedial law through which they are enforced. In the same way public law is subdivided into a "substantive" body of principles, established for the protection of the commonwealth, and "adjective" rules through which such principles are guarded and enforced.

6. As the rights of individuals are thus created and defined by substantive private law, to that source must we look for a description of a legal as distinguished from a moral right. The conclusion has been reached already that the force that gives validity to a legal right is, in every case, that which is

Private
law.

Right pre-
supposes
duty.

Legal right
defined.

Right as
correlative
of duty
not familiar
in early law.

Bentham
and Austin.

imparted to it by the state. Every right necessarily pre-supposes a corresponding duty for the reason that it implies the active or passive furtherance by others of the wishes of the party having the right. The capacity of control over the acts of another person, thus given by the law of the state, is said to be a right, while the corresponding liability of the other person to have his acts so controlled is said to be a duty. The legal right thus created and protected may be defined to be that which any one is entitled to have or to do, or to require from others, within the limit prescribed by law; or, in other words, a right is a legally protected interest. As Mr. Justice Holmes has well expressed it: "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right, and this is the same whether his claim is founded in righteousness or iniquity."¹ And it may be true, as the same author states, that legal duties are logically antecedent to legal rights. Certain it is that the higher abstraction, "right," which is the correlative of "duty, was not familiar in early law." The conception of right as the correlative of duty is an entirely modern acquisition of legal science. Bentham and Austin contributed more than any one else to familiarize the term. Since their day most schemes of law have substituted or have attempted to substitute "right" in place of "duty" as a basis of legal classification. Legal conceptions have consequently been largely recast and the attempt has been made to define everything in terms of "right." We must not, however, conceive that such analytical process has any connection, other than that of direct reversal, with the actual process of historical growth. That which to the analytical jurist seems most fundamental usually appears late in point

¹ *The Common Law*, p. 214.

of historical development. Such, in brief, is the history of the process through which analytical jurists have been able so to recast legal conceptions as to define everything in terms of "right,"¹—a method of study which enables us, while looking down upon the whole system from its highest point, to grasp it in its entirety. A legal right as thus understood embraces four elements: (1) the person in whom the right resides or who is benefited by its existence; (2) the object over which the right is exercised (whether it be a physical thing or what the law chooses to treat as such), if any; (3) acts of forbearance which the person in whom the right resides is entitled to exact; (4) the person obliged, or, in other words, against whom the right is available. "The nature of the right varies with a variation in any one of the four terms which are implied in it, and the variations in the nature of the right give rise to the main heads or departments of law."²

It is of prime importance to distinguish between rights available against all the world and rights available against determinate persons, — *jura in rem* and *jura in personam*, — phrases borrowed from the classical jurists, who used them originally to distinguish actions according as they were brought to vindicate rights of property or to enforce a personal obligation. The *jus in rem* is the badge of property; the *jus in personam* is a mere personal claim. The owner of property has the right to its exclusive enjoyment, which avails against all the world, but not against one person more than another; while the parties to a contract have rights available against each other, and against no other person. It thus appears that a right *in personam* is one available against a definite individual, while a right *in rem* is one capable of exercise over its object, without reference to one person more than another. Or, to employ the expressive phrase of Hugo,

Everything now defined in terms of "right." Elements of a legal right.

How the nature of a right varies.

Rights against all the world.

Jus in rem and *jus in personam* distinguished.

Hugo's expressive phrase.

¹ Street, *Foundations of Legal Liability*, iii. 6 sq.

² Holland, *Jurisprudence*, p. 88.

“there are rights against individuals” and “rights against all the world.”¹ First among rights of the latter class stands the right to personal freedom and safety, described in a general way in that clause of the Declaration of Independence which avers that men “are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are established among men.” The term “inalienable” is intended to indicate the fact that fundamental rights are from their very nature incapable of transfer. The unlimited waiver of such rights, such as self-sale into slavery, or self-dedication to monastic seclusion, though recognized in early law systems, is either forbidden or discountenanced by modern civilization. Such rights are “innate” because acquired at birth, and for that reason inchoate during the period of minority, while obscured by the superior right of parent or guardian, whose control involves custody and possible chastisement. Every well-ordered state undertakes to guarantee that no one of its subjects shall be killed, no matter how infamous or worthless he may be, or even sustain personal injury. A man has the right to be free even from menaces by gestures, such as the brandishing of a weapon or the presenting of a pistol, provided the assailant is near enough to him to do him bodily harm;² and *a fortiori* from actual assault and battery, from wounding, deliberately or through negligence, and from such actual restraint or show of force or authority as amounts to what English law calls “false imprisonment.” In the same way a man is entitled to protection from injury from dangerous substances or animals kept by another; and also from such as may result from latent dangerous places in the house or land of another, whereby damage may be sustained by a person

Right to
freedom
and safety.

The terms
“inalien-
able”

and “in-
nate.”

Right to
life.

Freedom
from
menace,
assault, and

“false im-
prison-
ment.”

¹ *Lehrbuch eines civilistischen Cursus*, v. 72.

² *Cobbett v. Grey*, 4 Ex. 744.

having lawful business there. Under this head may be placed the right to freedom of discussion, which embraces both the freedom of speech and of the press. At no time has there been in England any proclamation of the right to liberty of thought or to freedom of speech. As an eminent authority has stated it: "Our present law permits any one to say, write, and publish what he pleases; but if he makes a bad use of this liberty, he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender may be tried for the misdemeanor either by information or indictment."¹ Any man may therefore say or write whatever he likes, subject to the risk of, it may be, severe punishment if he publishes any statement, in writing, print, or by word of mouth, which he is not legally entitled to make. Or, to put the matter in a more sententious way: "Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written."² And here may be conveniently considered a man's right to reputation, to his good name, which no one has the right to take away from him through defamation by words spoken or written, or by gestures or pictures, in disparagement of the man himself or his family and belongings. The Twelve Tables recognized it to be a grave offense "*si quis occentavisset, sive carmen condidisset quod infamiam faceret flagitiumve alteri.*"³ While the Romans did not clearly distinguish defamation from insult given by blows, they classified acts of insult according to the rank of the person insulted, the place where, and the mode in which the insult was given. According to Roman law a son could sue for damages done

Freedom of discussion.

Definitions by Odgers and

Dicey.

Right to reputation.

Roman classification of insults.

¹ Odgers, *Libel and Slander*, Introd. (1st ed.), p. 12.

² Dicey, *The Law of the Constitution*, p. 234.

³ Cicero, *De Rep.* iv. 10.

Necessity
for wrong
intention.

English law
of defa-
mation.

Its basic
principle.

Necessity
for falsity.

to a statue of his father set up upon his tomb, while the heirs of a deceased person would have an action for an insult to his dead body, or to his funeral procession.¹ There could be, however, no infringement without a wrong intention, although not necessarily directed against the complainant; and no more than that is meant by the English doctrine of "malice" essential to defamation, since, where there exists no legal justification, malice will be "presumed."² It cannot be denied that the English law of defamation is in an anomalous state, a condition whose cause is to be discovered of course in legal history. As an able writer has well expressed it, "the crooked and wrenched form of the law of slander and libel can be accounted for, but it must be accounted for in the way we account for the distorted shape of a tree,—by looking for the special circumstances under which it has grown and the forces to which it has been exposed."³ And yet at the root of it all can be discovered the general principle which, with some success, has struggled for utterance through the decisions, and that is the fundamental notion found in the idea of harm as incident to interference with one's good name or reputation. The repute in which one is held in the community can only be impugned by the communication of spoken or written words, or by signs, pictures, or effigies which are equally competent to convey thought. That a particular communication is defamatory necessarily implies falsity in some respect or in some particular; a truthful communication gives no cause of action; malice does not make truth actionable;⁴ before a false communication can be a basis of legal liability it must be of a defamatory nature. Hence whenever it appears that the charge complained of was true

¹ *Dig.* 47. 1. 4; *Ibid.* 27; *American Law Review*, xxiii. 578.

² *Bromage v. Prosser*, B. & C. 255.

³ "Slander and Libel" (1872), 6 *American Law Review*, 597 (by N. St. John Green).

⁴ *Castle v. Houston*, 19 Kan. 417; *Foss v. Hildreth*, 10 Allen (Mass.) 76.

in fact and in substance when made, the action for defamation fails, however defamatory the publication may appear to be on its face. But proof of the truthfulness of a charge which is *prima facie* libelous or slanderous must come from the defendant, and the wise rule is adopted that such matter of justification must always be specially pleaded with particularity of detail.¹ One of the most important modes in which a defamatory statement may be justified is by showing that it is "privileged," an exceptional immunity whereby one is excused from the consequences of an act which upon general principles would furnish a ground of action. Under that head fall utterances of administrative functionaries; communications relating to affairs of state between officers of state in the course of official duty; reports made concerning a subordinate officer by his superior officer acting in the course of his military duty; utterances of members of parliament, or other legislative body, made in the course of legislative proceedings; utterances of judges, attorneys, witnesses, jurors, and even of parties litigant, made in the course of judicial proceedings.² As the American courts have been more loth than the English to declare privilege in any particular case absolute, it is here generally held that the privilege of lawyers, witnesses, and parties is conditional upon the pertinence of the matter to the question in hand, and its materiality.³ Not until a man is secure in his reputation is he in a position to enjoy all privileges and to perform all lawful acts which belong to him equally with every other member of the community. As such he is entitled to demand that the legal machinery, set up for his protection, shall not

Justification must be pleaded specially.

Privileged statements classified.

¹ *Van Ness v. Hamilton*, 19 Johns (N.Y.) 349; *Wachter v. Quenzer*, 29 N.Y. 552; *Wren v. Weild*, L. R. 4 Q.B. 213; *Tilton v. Beecher*, 59 N.Y. 176.

² *Kirkpatrick v. Eagle Lodge No. 32*, 26 Kan. 390; *Chatterton v. Secretary of State*, 2 Q.B. 189; *Dawkins v. Paulet*, L. R. 5 Q.B. 94; *Dillon v. Balfour*, 20 L. R. Ir. 600; *Coffin v. Coffin*, 4 Mass. 1; *Scott v. Stansfield*, L. R. 3 Exch. 220.

³ *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442; *Wright v. Lothrop*, 149 Mass. 385; *White v. Carroll*, 42 N.Y. 161.

Malicious
prosecu-
tion.

Its antiq-
uity in
Roman and
English
law.

Infliction
of costs.

Use of
waters and
highways.

Right to
one's occu-
pation.

be maliciously employed against him, without reasonable and proper cause, by the act known in English law as "malicious prosecution,"¹ which is simply a branch of defamation. The law of malicious prosecution is, however, far more ancient. "From the very twilight of English law," says Bigelow, "it has been unlawful for men to harass each other with vexatious suits."² In the earlier Roman law the institution of such suits was redressed by, amongst other methods, the institution of a cross action, "*calumniae iudicium*," which might be brought by the defendant against a dishonest plaintiff, either during the process of the principal action, or after judgment in his favor.³ The infliction of costs upon the suing party became, however, the chief restraint upon malicious or frivolous suits by the time of Justinian,⁴ the restraint now imposed by English law. As a member of the community every one is equally entitled to the enjoyment of the free and unobstructed use of the navigable waters and the public highways. Apart from the criminal prosecution which may be instituted for the redress of the public wrong resulting from interference with the use of them, each member of the community has also a private-law right not to be hindered by such interference, subject, however, to responsibility if he abuses the right of passage.⁵ Of more practical importance is the right of every one to pursue without molestation the occupation by which he gains his livelihood. In a notable case (1706) Lord Holt said: "He that hinders another in his trade or livelihood is liable to an action for so hindering him. . . . There are two sorts of acts for doing damage to a man's

¹ For a description of its elements, see *Abrath v. N.E. Ry. Co.*, II. App. Ca. 247.

² Bigelow, *Leading Cases in Torts*, 193.

³ Gaius (iv. 178), who says, "*Qui intelliget non recte se agere, sed vexandi adversarii gratia.*"

⁴ Cod. 3. I. 13. Concerning the oath as to the goodness of their cause, required of both plaintiff and defendant, as well as their counsel, see Cod. 2. 59.

⁵ *Harrison v. D. of Rutland*, 1 Q.B. (C. A.) 142.

employment, for which an action lies; the one in respect of a man's privilege, the other in respect of his property. In that of a man's privilege or franchise, whereby he hath a fair market, or ferry; if another should use the like liberty, though out of his limits, he shall be liable for an action though by grant of the king. . . . The other is where a violent or malicious act is done to a man's occupation, or profession, or way of getting a livelihood. There an action lies in all cases. But if a man doth him damage by using the same employment, no action will lie."¹ After the lapse of nearly two centuries an attempt, eventually unsuccessful, was made so to extend this principle as to render actionable persuasions and threats, unaccompanied by either fraud or violence, whereby an employer was induced to terminate the agreements of certain of his workmen, and not to employ them again. The plaintiffs having brought an action against the defendant, the jury found that he had maliciously induced the employers to discharge the plaintiffs and not to engage them, and gave the plaintiffs a verdict for damages. Judgment was entered in accordance with the verdict and the case was affirmed in the Court of Appeal,² and from that decision an appeal was taken to the House of Lords, where a number of the puisne judges were called upon to hear the final argument and to give their opinions upon a question propounded by the lords to them. The case was then decided by the lords, six being in favor of a reversal and three in favor of an affirmance.³ When in a later case the House of Lords was called upon to discover the rationale of the decision of *Allen v. Flood*, and to apply its doctrine to a very similar state of facts, Lord Chancellor Halsbury said: "The hypothesis of fact upon which *Allen v. Flood* was decided by a majority in this House was that the defendant there neither

*Keeble v.
Hickering-
gill.*

*Allen v.
Flood.*

*Quinn v.
Leathem.*

¹ *Keeble v. Hickeringill*, II. East, 575, n.

² *Allen v. Flood* (1895) 2. Q.B. 21.

³ *Allen v. Flood* (1898) A.C. 1.

uttered nor carried into effect any threat at all: he simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade-union official had no authority himself to call out the men."¹ In the light of the explanations made in the later case *Holland* concludes that, "it may be safely asserted that, as a general rule, in the absence of justification, coercion, and even persuasion, leading to the breach of a contract of service, on the part of either employer or servant, or perhaps if merely preventing the formation of such a contract, is an actionable wrong, if productive of actual damage to the party thereby intentionally, though indirectly, injured."² In the case of *William Adair*³ v. the United States, very recently decided by the Supreme Court, was involved the constitutionality of certain provisions of the Act of Congress of June 1, 1898, 30 Stat. 424, c. 370, concerning carriers engaged in interstate commerce and their employers. The 10th section, upon which the prosecution was based, is in these words:

Case of
William
Adair.

Constitu-
tionality
of act
assailed
because

"That any employer subject to the provisions of this act and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter

¹ *Quinn v. Leathem* (1901), A.C. 506. For an exhaustive analysis of these cases, see *Street, Foundations of Legal Liability*, i. 347 sq.

² *Jurisprudence*, pp. 180-181.

³ October Term, 1907, not yet reported. Opinion by Mr. Justice Harlan.

into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

The specific charge in the first count of the indictment was "that said William Adair, agent and employee of said common carrier and employer as aforesaid, in the district aforesaid, on and before the 15th day of October, 1906, did unlawfully and unjustly discriminate against O. B. Coppage, employee as aforesaid, by then and there discharging said O. B. Coppage from such employment of said common carrier and employer, *because of his membership in said labor organization, and thereby did unjustly discriminate against an employee of a common carrier and employer engaged in interstate commerce because of his membership in a labor organization*, contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States."

In the course of its opinion the court said: "The first inquiry is whether the part of the 10th section of the Act of 1898 upon which the first count of the indictment is based is repugnant to the Fifth Amendment of the Constitution declaring that no person shall be deprived of liberty or property without

repugnant
to Fifth
Amend-
ment.

due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good. This court has said that 'in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.' *Jacobson v. Massachusetts*, 197 U.S. 11, 29, and authorities there cited. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on *Torts*, p. 278, well says: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress.' . . . While as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, are subject to such reasonable restraints as the common

Relative
rights of
employer
and em-
ployed.

good or the general welfare may require, it is not within the functions of government — at least in the absence of contract between the parties — to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair — however unwise such a course might have been — to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so, — however unwise such a course on his part might have been, — to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. These views find support in adjudged cases, some of which are cited in the margin.¹ In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any

Equality of right between employer and employee.

¹ *People v. Marcus*, 185 N.Y. 257; *National Protection Asso. v. Cummings*, 170 N.Y. 315; *Jacobs v. Cohen*, 183 N.Y. 207; *State v. Julow*, 129 Mo. 163; *State v. Goodwill*, 33 W. Va. 179; *Gillespie v. People*, 188 Ill. 176; *State v. Kreutzberg*, 114 Wis. 530; *Wallace v. Georgia, C. & N. Ry. Co.*, 94 Georgia 732; *Hundley v. L. & N. R.R. Co.*, 105 Ky. 162; *Brewster v. Miller's Sons & Co.*, 101 Ky. 358; *N.Y. &c. R.R. Co. v. Schaffer*, 65 Ohio, 414; *Arthur v. Oakes*, 63 Fed. Rep. 310.

legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another. So far as this record discloses the facts the defendant, who seemed to have authority in the premises, did not agree to keep Coppage in service for any particular time, nor did Coppage agree to remain in such service a moment longer than he chose. The latter was at liberty to quit the service without assigning any reason for his leaving. And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing."

The court's
conclusion.

The court therefore concludes "that the provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment and as not embraced by nor within the power of Congress to regulate interstate commerce, but under the guise of regulating interstate commerce and as applied to this case it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair."

Commercial
competi-
tion.

The law of England is so tolerant of competition in business that it recognizes the innocence of commercial competition, causing, even intentionally, loss to others. That competition in trade and labor, unconnected with fraud, is a matter of very high, perhaps of absolute, legal privilege, is attested by two well-known cases decided respectively in 1411 and 1892. In the Gloucester Grammar School Case¹ it was held that an action would not lie where two masters of a grammar school brought an action of trespass on the case against another master who had set up a rival school in the same neighborhood and thereby deprived the plaintiffs of patronage and forced them to reduce their fees. In *Mogul Steamship Co. v. McGregor*² it was held that no action could be

Gloucester
Grammar
School
Case.

Mogul
Steamship
Co. v.
McGregor.

¹ Y.B. II. Hen. IV., 47, pl. 21.

² (1892) A.C. 25, affirming 23 Q.B.D. 598, and 21 Q.B.D. 544.

maintained where the plaintiffs alleged that the defendants had injured them by entering into a conspiracy to prevent the vessels of plaintiffs from being employed by shippers in Chinese ports to carry their cargoes of tea to London. The conspiracy was alleged to have been put into effect by bribes, coercion, and threats; and it was proven among other instances of this that the defendants had offered a special discount to those exporters who employed them alone; and also had organized a plan of sending steamers of their own to meet any vessels sent to Hankow by the plaintiffs and to underbid them, even by accepting rates of freight so low as to be actually unremunerative. In that case Bowen, L.J., observed in the Court of Appeal that shipowners and merchants are not bound by law to conform to any imaginary "normal" standard of freights or prices, and that the law courts do not undertake to say to them in respect to their competitive tariffs, "Thus far shalt thou go and no farther." And yet there are certain forms of unfair competition, involved with interference with trade-marks, trade-names, and the like, which are not allowed.¹ In the United States there is certainly a strong and growing tendency against "unfair competition" by means of "trusts" and "combines," strongly accentuated by the decisions that have arisen out of the application of what is known as the Sherman Anti-Trust Law of 1890.²

Unfair competition as to trade-marks and the like.

From the consideration of rights that relate to no tangible external object we must pass to those proprietary rights that represent the extension of the power of an individual over portions of the physical world. When the state is organized the strong hand of law gives to the mere fact of

Possession.

¹ See Street, *Foundations of Legal Liability*, i. 416, 425.

² See *Chattanooga Foundry & P. Works v. Atlanta*, 203 U.S. 390; *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401; *Guss v. Nelson*, 200 U.S. 298; *Peoria Gas & Electric Co. v. Peoria*, 200 U.S. 48. As to illegal trusts under modern anti-trust acts, see note to *Whitwell v. Continental Tobacco Co.*, 64 L.R.A. 689.

possession that protection which the savage, who has hidden the game he has killed in his cave, can hope for only so long as it is undiscovered, or "so long as he watches to defend it, or is stronger than his rivals."¹ In all law systems the fact of being the first finder, discoverer, or possessor of a thing has invariably enforced in favor of such a person the claim to actual proprietorship. Neither the Roman nor the common law, however, gives to the pursuer of wild animals the rights of possession until escape has been made impossible by some means. Until then another may step in and kill or catch and carry off the game if he can.² According to Justinian a wild beast so badly wounded that it might easily be taken must be actually taken before it belongs to its captor.³ And an English court has held that when fish were nearly surrounded by a seine, with an opening of seven fathoms between the ends, at which boats were stationed to frighten them from escaping, they were not reduced to possession as against a stranger who rowed in through the opening and helped himself.⁴ On the other hand, Judge Lowell has upheld a custom of the American whalers in the Arctic Ocean which gives the whale to the vessel whose iron first remains in it, provided claim be made before cutting in.⁵ In Roman law the possessory Interdicts of the praetor had the greatest possible validity for the purposes of guarding even the most casual and transitory claims of an actual possessor, and, under certain circumstances, of enabling such claims to mature into substantial rights of ownership. The classical jurists recognized two degrees of control over an object, the lower of which is known to modern civilians as *detentio*, the higher as *possessio*, properly so called. "Possession is the occupation

Pursuer of animals.

Of fish.

Of whales.

Detentio and *possessio* distinguished.

¹ Bentham, *Principes du Code Civil*, par Dumont, ch. IX.

² *Dig.* 41. 1. 5, 2 Kent's Comm. 349, citing *Pierson v. Post*, 3 Caines (N.Y.) 175; *Buster v. Newkirk*, 20 Johnson (N.Y.) 75.

³ *Inst.* 2. 1, 13.

⁴ *Young v. Hichens*, 6. Q.B. 606.

⁵ *Swift v. Gifford*, 2 Lowell 110. Cf. Holmes, *The Common Law*, p. 218.

of anything with the intention of exercising the rights of ownership in respect of it.”¹ It has been well said that possession stands in a position intermediate between simple detention and absolute ownership, and that it implies two elements, a physical and a mental one, — physical detention and mental intention to hold the thing possessed as one’s own. In the words of the Digest, *Apiscimur possessionem corpore et animo, neque per se animo aut per corpore*.² Only that kind of possession was protected by the Interdicts, regardless of the justice or injustice of its origin, against any one from whom it had not been acquired *vi clam aut precario*.³ *Naturalis possessio*, which implied mere physical contact with a thing apart from all attempted exercise of rights with respect to it, carried no rights of any kind with it. Only when physical contact was accompanied with the fact of intentional and conscious exercise of rights of ownership (*possessio ad interdicta*) was the Interdict of the praetor available to reinstate the possessor provisionally even if ousted by the true owner. Mere detention or *naturalis possessio* exists when the intention to dispose of the object is limited by a distinct recognition of the outstanding right of another; *possessio* exists when the holder believes himself to be the rightful owner of the object, or, having merely found it, intends to keep it subject to the possibility of the owner making his appearance,⁴ or, having stolen it, means to keep it against all comers.⁵ The intention of such a possessor has been described by modern civilians as the *animus domini*, or more recently as *animus possidendi*. The position of the possessor in Roman law was a very strong one. If a *bona fide* possessor, he could bring an action for *furtum* even against the owner; if a *mala fide* possessor of land, he was so

Only possession protected by Interdicts.

The *animus domini*.

¹ Hunter, *Roman Law*, 209.

² Cf. Savigny, *Recht des Besitzes*, § 42.

³ *Dig.* 43. 17. 2.

⁴ *Dig.* 41. 2. 3. 1.

⁵ *Dig.* 5. 3. 11–13.

Savigny's
view.

Holland's
criticism.

Ihering's
attack.

far protected that he could not be ejected by force.¹ In analyzing the grounds of distinction drawn by the Roman lawyers between the possession which would be and that which would not be protected by the Interdicts, it is necessary to turn to Savigny, the only German writer on the subject with whom English readers are generally acquainted, who said that the *animus domini*, or intent to deal with the thing as owner, is in general necessary to turn a mere physical detention into juridical possession.² According to German opinion the type of Roman possession was that of an owner, or of one on his way to become owner. German philosophy teaches that a man's physical power over an object is protected because he has the will to make it his, and it has thus become a part of his very self, the external manifestation of his freedom.³ In criticising Savigny's theory Holland well says that it is "open to the objection that it does not account for the fact that the Interdicts were also accorded to the *emphyteuta*, the pledge holder, the *precario tenens*, and the *sequester*, to none of whom can the *animus domini* be attributed. Savigny was only able to reply by saying that for practical reasons what we call a 'derivative' (*abgeleiteter*) possession was admitted in these cases."⁴ In the attack made upon the key to Savigny's position (the *animus domini*) by Ihering in his latest work, *Ueber den Besitzwillen*,⁵ the contention is that the difference between detention and interdict-possession has nothing to do with the will; that whoever so far exerts his will over an object as to obtain detention of it, possesses it for all purposes except in so far as possession is

¹ A *mala fide* possessor of movables could, however, acquire no rights contrary to that principle of English law, where in certain cases a thief can give a good title to stolen goods, though he has no title himself.

² *Recht des Besitzes*, § 21.

³ "The will which wills itself, that is, the recognition of its own personality is to be protected." Puchta, *Institutionen*, §§ 224, 226; Windscheid, *Pand.*, § 148, note 6.

⁴ *Jurisprudence*, pp. 191-192.

⁵ Jena, 1889, v. 327.

denied to him by some special rule of law. Ihering appeals for aid to a variety of special rules of law to explain the denial to borrowers, lessees, and the like, of the possessory remedies to which in accordance with his theory they are *prima facie* entitled, just as Savigny appealed to a fictitious "derivative" possession in the case of the pledge holders and others who on principle would not be possessors. Or, as Mr. Justice Holmes has expressed it: "Ihering, to be sure, a man of genius, took an independent start, and said that possession is ownership on the defensive; and that, in favor of the owner, he who is exercising ownership in fact (*i.e.* the possessor) is freed from the necessity of proving title against one who is in an unlawful position. But to this it was well answered by Bruns, in his later work, that it assumes the title of disseisors to be generally worse than that of disseisees, which cannot be taken for granted, and which probably is not true in fact."¹ Teutonic law, ignoring the two grades of possession which have so perplexed the civilians, has granted possessory remedies freely to persons who in Roman law could never have profited by the Interdicts. While possessory rights are denied to servants,² the common law, ignoring the distinction between detention and possession, grants possessory remedies to all persons in occupation of land or having custody of goods. From time immemorial all bailees have been regarded by English law as possessors, and entitled to the possessory remedies. The theory is that every bailee has a true possession, and that a bailee recovers on the strength of his possession, just as a finder does, and as even a wrongful possessor may have damages or a return of the specific thing from a stranger to the title. And besides those concerning bailees and tenants, there is a class of English cases which will probably, although not necessarily, be decided one way or the other, as we

Holmes's
comment.

Possessory
remedies
granted by
Teutonic
law.

All bailees
entitled.

¹ *The Common Law*, p. 208, citing *Besitzklagen*, pp. 276, 279.

² *Dicey, Parties*, pp. 335-358; *Pollock & Wright, Possession*, p. 59.

adopt the test of an intent to exclude, or of the *animus domini*.¹

Occupatio
in inter-
national
law.

The Roman law doctrine of possession or occupation has been of immense importance in international law. According to that doctrine anything without an owner, *res nullius*, might be taken possession of by any one who desired to keep it, and such taking possession, as a mode of acquisition, was known as *occupatio*.² If the thing thus acquired had once had an owner it was necessary to show that he had voluntarily abandoned it, while the new possessor was also required to manifest his purpose to retain it, — “apprehension must be accompanied by an *animus possidendi*, or *rem sibi habendi*.”³ As

Res nullius
in Roman
law.

res nullius the Romans counted a new island found in the middle of a river, divisible between the riparian owners by a line drawn midway between the banks; or what is more to the point, a new island rising in the sea through volcanic action, to which Italy was no stranger. Such was the source to which Grotius turned for the rules that were to regulate, to some extent at least, the process of discovery and settlement applied by the European nations to the partition of the New World. By discovery each nation was supposed to take possession of what it desired as *res nullius*; by settlement, to manifest its intention to keep it as its own.⁴

Doctrine
applied to
partition
of New
World.

Ownership.

A broad distinction was drawn in Roman law between possession and ownership (*dominium*); distinct interests protected by different remedies, — possession by interdict, ownership by action. While the higher is no doubt a develop-

¹ Holmes, *The Common Law*, pp. 174 sq. and 221, citing as a starting-point *Bridges v. Hawkesworth*, 15 Jur. 1079; 7 Eng. L. and Eq. 424.

² The taking of what previously belonged to no one: “quod enim nullius est, id ratione naturali occupanti conceditur.”

³ Mackeldey, *Modern Civil Law* (Kaufmann's ed.), i. 249.

⁴ In *Johnson v. McIntosh*, 8 Wheat. 573, Marshall, C.J., said: “This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made against all other European governments, which title might be consummated by possession.”

ment of the lower right,¹ ownership is that far ampler measure of right over an object which a person possesses irrespective of actual, or even constructive, control over it. It is that interest which Austin has described as a right "over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration."² Within the limits which the policy of the state prescribes by virtue of its *dominium eminens* the owner is allowed to exercise his natural powers over the subject-matter, excluding all and accountable to no one. On the other hand, the possessor is permitted to exclude all but one, and is accountable to him alone. Leaving out of view such things as are incapable of appropriation, such as air, and in most cases water, and such things as are set apart for the general purposes of the state, ownership may extend to things movable and immovable, *res fungibiles* and *non-fungibiles*, things corporeal and incorporeal, *singulae res* and *universitas rerum*, and things divisible and indivisible, principal and accessory, existing and about to exist. Acquisition, original or derivative, may take place through occupancy, specification, accession, invention, prescription, alienation in life, alienation on death, adjudication, and forfeiture. Apart from dominion or absolute ownership, in which the mode of user, duration of the right, and facilities of alienation are unlimited or indefinite, there are lesser rights of ownership including emphyteusis, and usufructuary estates generally, servitudes or easements, and generally all *jura in re* according to the largest intent of the classical jurists, including the rights of carriers, of depositaries, or pledgees, and of the merest possessors; and estates for life, for years, or upon condition, copyhold estates, and estates in tail in English law. Rights of ownership less than the most unrestricted ones are strictly limited on many sides; and their classi-

Extent of the owner's interest.

Things to which ownership may extend.

Acquisition, original or derivative.

Ownership, absolute and qualified.

¹ "Dominium rerum ex naturali possessione coepisse Nerva filius ait." *Dig.* 41. 2. 1. 1. See also Cic. *De Off.* i. 7.

² *Jurisprudence*, ii. 477; cf. iii. 2.

fiction may rest upon the differences in the mode of the user allowed, in the duration of the right, or the faculties for its transmission from hand to hand.

Immunity
from
fraud.

Another right available against all the world is that guaranteeing to every one an immunity from fraud, which relieves the person pleading it on the ground that he was deceived with respect to the immediate consequences of his act. As the idea of moral responsibility involves the capacities of forming an intention, of willing and of acting, it cannot be complete where the intent to do an act to be immediately followed by a certain set of foreseen consequences is thwarted either by the concealment of the real consequences of the act intended or by the crafty substitution of another set of unforeseen consequences which the actor never contemplated. Fraud occurs when, by means of a representation neither true nor believed to be true by the person making it, the will of another is intentionally driven to a decision harmful to his interests. As defined by Servius, "*dolus malus*" is "*machinatio quaedam alterius decipiendi causa, cum aliud simulatur et aliud agitur*"; by Labeo, "*omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum, alterum adhibita*."¹ The *actio de dolo* submitted no question of legal right for the consideration of the judge, but only a question of fact, proof of which was to be followed by a condemnation. The formula ran thus: "Titius be judge. Should it appear that, through the fraud of N. N., A. A. was induced to convey and give up possession of his farm (describing it) to N. N., then, Judge, unless according to your order N. N. restores it, you will condemn him in damages to A. A.; if it shall not so appear, you will acquit him."² In English and American law "fraud is a false representation of fact, made by the party who is charged with it, with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with

*Dolus
malus* in
Roman
law.

*Actio de
dolo.*

Fraud as
defined in
English and
American
law.

¹ Dig. 4. 3. 1.

² Cf. Muirhead, *Roman Law*, p. 341.

the intention that it shall be acted upon by the complaining party, and actually inducing him to act upon it, to his damage. From this definition, it is necessary, in order to constitute fraud, the following constituent elements be present, viz.: (a) a false representation; (b) a representation of fact; (c) a representation made by the party charged; (d) knowledge of its falsehood or a reckless indifference in the matter; (e) an intention that it shall be acted upon by the other party, (f) a reliance upon it by the other party; (g) damage to the party deceived.”¹ If the representation is believed in, it does not make it fraudulent that it is not founded on reasonable grounds. But the absence of reasonable grounds for the belief may be some proof that the belief was not honestly entertained.¹ That principle has been thus stated by the House of Lords in the leading English case:² “In my opinion, making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. . . . At the same time, I desire to say distinctly that when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an altered belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was really entertained, and that the representation was a fraudulent one.”³ Thus, in the case cited, the House of Lords reversed the Court of Appeal where it was held that it was enough if the statement be such

Lord
Herschell's
statement.

¹ Lawson on Contracts, p. 284.

² Lord v. Goddard, 13 How. 198; Lamberton v. Dunham, 165 Pa. St. 129; Salisbury v. Howe, 87 N.Y.

³ Lord Herschell in Peek v. Derry, 14 A.C. 375.

Pollock's
opposition.

as an ordinarily careful man in the defendant's position would not have believed to be true, a view strenuously supported by Sir Frederick Pollock.¹ Some courts hold that a positive statement of fact within one's means of knowledge implies that he has knowledge and that therefore the statement if false is fraudulent.²

Family
rights
incident to
marriage.

In concluding the consideration of rights available against all the world, mention must be made of those most vital to the state, which are vested by virtue of the institution of marriage in the husband, and to some extent in the wife, to the society and control of the family. As polygamous and

Polygamous
and incestuous
marriages.

incestuous marriages are always void in Christian countries, though valid where contracted,³ it is hardly necessary to consider such as fall within either category. It is most important to consider the institution of marriage as it has existed

"Free
marriage"
at Rome.

at Rome and in England and in states that have drawn from those sources. Whatever may have been the case in pre-historic times, at the date of the Twelve Tables a marriage could be contracted without any ceremonies whatever, by the sole consent of the parties, the husband not acquiring any power over the wife, and the latter retaining whatever property she previously possessed. And yet while such a "free

Manus
and its con-
sequences.

marriage" was possible, the almost invariable custom in the old days was to add to the marriage a ceremony creating a relation, called by the Romans hand (*manus*), which brought the wife into her husband's power, putting her, so far as legal rights were concerned, in the position of a daughter (*filiae loco*). Thus the husband became entitled to all the property she had at the marriage and all she might acquire afterwards,

¹ L.Q.R. v. 410. Sir W. Anson supported the view of the House of Lords, whose decision gave rise to the Directors Liability Act, 1890.

² Chatham Furnace Co. v. Moffatt, 147 Mass. 403; Cole v. Cassedy, 138 Mass. 437; Olcott v. Bolton, 50 Neb. 779; Raley v. Smith, 73 Mo. 310; Cowley v. Smyth, 46 N.J.L. 380.

³ As to polygamous and incestuous marriages, see Minor, *Conflict of Laws*, §§ 9, 75.

whether by gift or by her own labor, which he could command. The wife was entitled to the support of her husband, and to receive a share of his property at his death, as one of the "family heirs" (*sui heredes*), whom he could disinherit only in a formal way. The wife thus passed out of her original family, losing her rights of inheritance in it. With the final extinction of *confarreatio*¹ and *coemptio*,² the two forms of ceremony by which the power of the hand (*manus*) could be created, that ancient form of despotic control completely disappeared. From the time of Julius Caesar onward the marriage without hand had become the rule, while from the time of Hadrian onward the legal acts usually accompanying the marriage, which placed the wife under the husband's control, were almost obsolete.³ Under the new practice, universal in the time of Tacitus, Juvenal, and Martial, the Roman wife was as independent of her husband as if she had remained unmarried. He had little control over her actions; her property, no matter how received, remained her own for all purposes; she did not enter her husband's family; and she acquired only a very limited right of intestate succession to his property. Thus a high conception of marriage arose which Modestinus has defined as a partnership in the whole of life, a sharing of rights both sacred and secular.⁴ At last the wife is the husband's equal, — a fact expressed in the phrase the bride anciently used when brought to the husband's

Its abolition.

Emancipated Roman wife.

Marriage defined by Modestinus.

¹ A religious ceremony, originally confined to members of the patrician houses, conducted by the high priests of state, in the presence of ten witnesses. Gai. i. 112. See Rossbach, *Die römische Ehe* (Stuttgart, 1853), pp. 95 sq.

² A mode of acquiring *manus* over their wives by plebeians, after they had become citizens. The only copper needed was a single *raudusculum*. The words recited in the ceremonial were necessarily different from those of an ordinary mancipation. Gai. i. 123.

³ While there was a distinction between *justae nuptiae*, which could only be contracted between Roman citizens, and the *matrimonium juris gentium*, created by the marriage of a full citizen to a half citizen or an alien (*peregrinus*), the latter was perfectly valid, and the children were legitimate. As to their status, see Gai. *Inst.* i. 78. 79.

⁴ "Nuptiae sunt conjunctio maris et feminae et consortium omnis vitae, divini et humani juris communicatio." *Dig.* 23. 2. 1.

house, *Ubi tu Gaius, ego Gaia*. And here let the fact be emphasized that the act whereby marriage was contracted was purely a private act, without any state intervention, without registration or other public record of any kind. The act was purely a civil act, to which no religious or ecclesiastical rite was essential either in heathen or Christian times; the act required no prescribed form. According to the invariable Roman maxim, "Marriage is contracted by consent only" (*nuptiae solo consensu contrahuntur*).¹ The canon law, collected and codified in the thirteenth and fourteenth centuries, so far adhered to the established Roman doctrine as to recognize, prior to the Council of Trent, the main principle that marriage requires nothing more than the free consent of the parties, so expressed as to show that the union is to be a permanent and lawful one. That Council passed a decree which, after reciting that clandestine marriages, though blameworthy, had been held valid, declared, against the strong protest of some of its members, that for the future all should be deemed invalid unless celebrated in the presence of a priest and of two or three witnesses.² While in England, where the influence of the Roman system was, of course, less than in France and Italy, the decrees of Trent were not recognized, the motive that prompted its action in this particular induced the ecclesiastical courts to favor the almost universal custom of marrying before a clergyman, and to require in all other cases strict proof that a real consent, creating a lawful marriage, had actually been given.³ So much of the English law of marriage as pertained to the marriage relation itself,

A civil act
without
state inter-
vention.

Council of
Trent.

Its indirect
influence in
England.

¹ The relation rested entirely on the free will of the parties. In the third century the Emperor Severus Alexander said: "*Libera matrimonia esse antiquitus placuit.*" Cod. 8. 38. 2. A formal betrothal (*sponsalia*) generally preceded the actual wedding.

² But that Council (sess. xxiv., cap. i., *Decretum de Reformatione Matrimonii*) anathematizes "*qui falso affirmant matrimonia a filiisfamilias sine consensu parentum contracta irrita esse.*" See A. Rivier, *Droit de Famille Roman*, p. 142.

³ In the case of *Reg. v. Millis*, 1843, an Irish appeal, the House of Lords was equally divided upon the question whether consent, and consent alone, was

that is to say, to the capacity for contracting it (including the prohibited degrees), to the mode of contracting it, and its dissolution, complete or partial, belonged to the canon law and was administered in the spiritual courts; while so much of it as affected the property rights of the two parties, especially rights to land, belonged to the common law and was administered in the temporal courts. The effect of the law of England upon the property and personal rights of the wife has generally been described as making the two consorts one person in law. By virtue of that oneness the wife was incapable of making a valid contract, and was therefore not liable on any agreement she might enter into. By marriage the husband became entitled to the rents and profits of all real estate owned by the wife at the time of the marriage, and of all such as might come to her during coverture, and if a child was born of the marriage, his interest lasted for the whole of his life whether his wife survived him or not. As to the personal property of the wife in her possession, the husband became entitled at once on the marriage to it absolutely. He might dispose of it as he saw fit during her life, whether with or without her consent; he might bequeath it by will; and after his death such property was regarded as assets of his estate, the title passing to his executors and administrators to the exclusion of his wife, though she survived him. The wife's earnings belonged to the husband, and so did real estate purchased with them during the coverture.¹ The marital right of chastisement, incident to marriage in many rude societies,² was not wanting in English law.³ The wife

Canon and
common
law.

Consorts
one person
in law.

still all that was necessary to make a marriage valid. According to Lord Stowell's view, the presence of a clergyman was not essential. *Dalrymple v. Dalrymple*, 2 Haggard 54. Upon the whole subject, see Bryce, *Studies in History and Jurisprudence*, Essay XVI.

¹ For the authorities, English and American, see Lawson on Contracts, pp. 189-190.

² Apparently, in the early days at Rome, the husband could punish the wife even with death, after holding a family council.

³ 1 Blackstone, *Comm.*, bk. 1., c. 15.

Actions for
and against
wife.

Influence of
courts of
equity.

Final eman-
cipation by
Parliament.

could bring no action without joining the husband as plaintiff, nor could she be sued without joining him as defendant. She could not give evidence for or against him (save where the offense was against herself), and if she committed a crime (other than treason or murder) along with him, she went unpunished, on the hypothesis that she did it under his compulsion.¹ The wife's slavery as thus defined by the common law was first lightened by courts of equity which, after establishing the wife's equity to a settlement, finally admitted that she was capable of possessing property for her own use, independently of her husband, a principle gradually widened until it became fully settled, that however the wife's property might be acquired, whether through contract with her husband before marriage or by gift from him or from any stranger independently of such contract, equity would protect it, if duly set apart as her separate estate.² Nor was the interposition of a trustee essential; the court would even hold the husband, if necessary, a trustee for her.³ Finally the gross injustice of allowing a selfish or wasteful husband to seize his wife's earnings and neglect her was remedied by several acts (the first in 1857); and in 1870 Parliament, taking the step which the Romans had taken long before the Christian era, and which many of the American states had taken in the first half of the nineteenth century, passed a statute, amended and extended by others of 1874 and 1882, whereby was swept away the old rule which, by the mere fact of marriage, vested all of the wife's property in the husband. And so, by slow degrees, has the wife who is subject to English law risen at last to the level of independence finally guaran-

¹ In a case in the thirteenth century, where the husband and wife had produced a forged charter, the husband was hanged and the wife went free, "because she was under the rod of the husband" (*quia fuit sub virga viri sui*). Pollock and Maitland, vol. ii., p. 406 (quoting Bracton, f. 414).

² Schouler on Husband and Wife, p. 191.

³ *Rech v. Cockell*, 9 Ves. 375; *Barron v. Barron*, 24 Vt. 375; *Steel v. Steel*, 1 Ired. (Eq.) 452.

teed by Roman law, through a process of judicial and statutory emancipation that secures to a woman whatever she possesses at her marriage or receives after it, or earns for herself, just as if she were unmarried, while the husband no longer becomes liable by marriage for her ante-nuptial debts.

In English and American law the two essential elements of the legal idea of marriage are: (1) the contract of marriage, the agreement of the parties, the wedding ceremony; and (2) the state of life which is ushered in by that ceremony or agreement, the matrimonial union, or the marriage status. The proper law regulating the marriage status may be divided into the following heads: (1) the law governing the commencement of the status; (2) that governing the continuance of the status, with the incidents arising therefrom; and (3) the law governing the dissolution of the status, or divorce. As the contract of marriage thus gives rise to a status, it must be governed by rules varying somewhat from those governing contracts generally. The incidents of the marriage tie arise by operation of law from the marital relation, not from the marriage contract, and are to be determined and controlled in general by the same law that controls that relation, the *lex domicilii*, unless the particular case is one of the great exceptions.¹ As against all the world the husband has the marital right that no other man shall, by force or persuasion, deprive him of his wife's society, still less be criminally intimate with her; and, by recent American cases, an analogous right has been recognized as vested in the wife.² The proposed Civil Code of the state of New York³ (pt. ii., § 32)

Marriage status in English and American law.

Analogous rights of husband and wife.

¹ See statement of Appleton, J., in *Adams v. Palmer*, 51 Me. 481, 483; *State v. Tutty*, 41 Fed. Rep. 753, 758.

² See *Westlake v. Westlake*, 34 Ohio St. R. 621; *Kneesy v. Exner*, Brooklyn Superior Court, N.Y.; *Mehrhoff v. Mehrhoff*, U.S. Circuit Court, 26 Fed. Rep. 13; *Foot v. Card*, 58 Conn. 1. See also an article entitled "The Husband-Seducer," in 26 Am. Law Review (1892).

³ Adopted in California, Montana, and North and South Dakota. Cf. Holland, *Jurisprudence*, p. 168 and note 3.

Parental
rights and
duties.

Seduction.

Tutor or
guardian.

Right of, as
defined by
Servius.

expressly forbids "the abduction of a husband from his wife or of a parent from his child." The rights and duties of parents with respect to their children may be regarded as an incident to the marriage relation, or the relation of parent and child may be treated as a distinct status or condition. So far as the rights of personal control, treatment, or chastisement are concerned, these are usually considered questions of local policy or police, the extent of which must be determined and fixed in each state by its own laws, as to all persons within its borders, regardless of their legal situs or domicile.¹ The English action of seduction rests upon the assumption that the person wronged is not the girl herself, who may be supposed to have consented to the act, but her parent, or other person entitled to her services,² who is damned by its results. An artificial extension of the parental power may take place when one or both of the parties die before the child or children of the marriage shall have attained to an age at which they may be presumed competent to avail themselves of the rights or to perform the duties cast upon an adult. Such an artificial extension may be conferred by the last will of the parent, or by a deed executed by him, or by a judicial act, or by a devolution on certain defined classes of relatives, or may vest in a tribunal, such as an equity court. The right of a tutor, or guardian, defined by Servius as "*jus ac potestas in capite libero ad tuendum eum qui propter aetatem se defendere nequit*,"³ is given of course to him, not for his own benefit, but for that of his *pupillus*, or ward; and terminates on the death of tutor or ward, on

¹ *Woodworth v. Spring*, 11 Allen (Mass.) 321; Jac. Dom. § 33. See also *Blackinton v. Blackinton*, 141 Mass. 432, 435, 436.

² The master of a maid-servant has a right of action for her seduction. *Fores v. Wilson*, Peake 55. No action, however, lies against a seducer who is also the girl's employer. *Whitbourne v. Williams*, 2 K.B. 722. As to the right of a parent to recover for the seduction of a daughter over twenty-one, although there is no actual contract of service, see 2 Kent (12th ed.) 205, note 1.

³ *Dig.* 26. 1. 1.

the resignation or removal of the former, and on the marriage of the latter or his attaining a certain age. As the status of guardianship, like that of administration,¹ is a local and temporary status and not a permanent and universal one, the powers and liabilities of the tutor or guardian are for the most part local to the place of his appointment and qualification. Another family right that should be mentioned here is that exercised by the master over his slaves, which, in early law, was as ample as that exercised over his cattle.² Such right was infringed by killing the slave, by injuring him so as to make him less valuable, or by enticing him away. A large chapter in Roman law is filled by the disabilities of *libertini* and their duty towards their *patroni*. The general abolition of slavery, universal in the ancient world, represents one of the occasional breaks in the continuity of the history of law, the effect of which has been to clear the conception of a legal person as opposed to a thing from all the ambiguities attaching to that conception so long as human beings were treated to a greater or less extent as if they were chattels.

Master
and slave.

Abolition of
slavery
and its
effect on
history of
law.

Having now completed the examination of rights available against all the world (*jura in rem*), consideration must next be given to rights available against determinate persons (*jura in personam*). To rights *in rem* the Roman jurists opposed the topic "Obligations," which must not be confused with the far narrower term as sometimes used in English law, as it includes all rights *in personam*, whether prior to wrong-

Rights
available
against
determinate
persons.

"Obligations."

¹ For important distinctions between the two classes of fiduciaries, see *Lamar v. Micou*, 112 U.S. 452.

² Not until the doctrines of the *jus naturale* began to gain ground was the slave reckoned as anything more than a chattel. The doctrine that slavery is against nature was older than Aristotle, who does not accept it. See W. L. Newman's *Politics of Aristotle*, Introd., p. 141. The improved position in Justinian law is manifested by the declaration that "slavery is contrary to the law of nature; as, according to the natural law, all men were from the first born free." *Inst.* 1. 2. 2.

What the
term
embraces.

doing or arising out of it.¹ In its broadest sense the term is synonymous with duty, and, as its etymology shows, it signifies a tie of some kind which binds us to the performance of any act we ought to do. When thus understood it is possible to comprehend how the jurists of the classical period attributed obligation either to contract, delict, or miscellaneous causes (*variae causarum figurae*). It thus embraced *obligationes ex contractu* and *quasi ex contractu*, *obligationes ex delicto* and *quasi ex delicto*. No other part of the law system was so thoroughly worked by the Roman jurists as the law of obligations; no other part has been so fully absorbed into the juristic systems of the modern world. In considering the sources of obligations it is not logical to say that an obligation and a contract are one and the same thing as they bear the relation of effect and cause. While every valid contract creates an obligation, every valid obligation does not create a contract. On the contrary, the civilians now recognize five sources of obligations: (1) contracts; (2) quasi-contracts,

Five sources
of obli-
gations.

"Contract"
defined.

(3) offenses; (4) quasi-offenses; (5) the operation of law.² When we consider the narrower and more usual sense of the term "contract," signifying such a two-sided act as creates rights *in personam*, we find it well defined in the phrase of Ulpian to be "*duorum vel plurium in idem placitum consensus*":³ a meeting of two or more minds on the same plane with reference to the same thing. Or, as Savigny has expressed it, it is in this sense "the union of several in an accordant expression of will, with the object of creating an obligation between them."⁴ To the same effect are the words of Pothier, who defines a contract to be an agreement whereby

¹ E.g. "obligamur aut re, aut verbis, aut simul utroque, aut consensu, aut lege, aut jure honorario, aut necessitate, aut ex peccato." Modestinus, in *Dig.* 44. 7. 52, cited by Holland (*Jurisprudence*, p. 235, note 1), who refers to the more familiar list of the sources of obligation given in *Inst.* 3. 13. 2.

² Cf. Howe, *Studies in the Civil Law*, pp. 207 sq.

³ *Dig.* 2. 14. 1, § 1.

⁴ *Obligationenrecht*, ii., p. 8. Cf. Puchta, *Inst.* iii., p. 89.

two parties reciprocally promise and engage, or one of them singly promises and engages to the other, to give some particular thing, or to do, or abstain from doing, some particular act.¹ The Code Napoléon defines a contract to be "an agreement by which one of several persons bind themselves towards one or several others to give, to do, or not to do something." The *contractus* is one thing, the *obligatio ex contractu* is another. The act alone is the contract, the resulting contractual relation is quite another thing. The general rule, that rights cannot be acquired by third parties who are not a party to a contract unless by the creation of a trust,² has been departed from by a New York case establishing an exception in favor of certain beneficiaries under a contract to which they were not parties,³ an exception which seems to have been carried still farther by a recent English case.⁴ According to Savigny's analysis, the constituent elements of a contract are: (1) several parties; (2) an agreement of their wills; (3) a mutual communication of this agreement; (4) an intention to create a legal relation between the parties.⁵ In harmony with that analysis the civilians usually consider that four requisites are necessary to the validity of every contract: (1) parties legally capable of contracting; (2) their consent legally given; (3) a certain object which forms the matter of the agreement; and (4) a lawful cause or motive. Thus in every case the inquiry must be made, first, whether the parties are incapable of contracting by reason of minority, lunacy, coverture, or the like; second, whether consent has been prevented by error, fraud, or force;

Rights of
third
parties.

Savigny's
analysis.

Four requi-
sites to
validity.

¹ *Oblig.*, art. I.

² *Tweddle v. Atkinson*, 1 B. & S. 393. The federal courts of the United States seem on the whole to take the same view. See E. A. Harriman, *Elements of the Law of Contracts*, pp. 215-228.

³ *Lawrence v. Fox*, 20 N.Y. 268.

⁴ *The Satanita* (1895), P. (C.A.) 248 (1897) A.C. 59. Cf. Holland, *Jurisprudence*, p. 250 and notes 4, 5, 6.

⁵ *System*, iii. 308.

Interpreta-
tion or con-
struction.

Bases of
classifica-
tion.

A logically
convenient
arrange-
ment.

third, whether the object of the contract, *i.e.* the thing which the parties agree to give, to do, or not to do, is something definite or capable of definition, something possible in itself; and, fourth, whether the cause or motive (the equivalent of "consideration" as used in English and American law) is real and lawful. The next vitally important subject is that of interpretation or construction resting upon rules formulated by the Roman jurists which still abide at the foundation of modern doctrines regulating the interpretation or construction of statutes and agreements, and even of treaties. In summarizing the bases upon which contracts have been classified a distinguished authority has said: "There is (1) the historical basis, which was the one adopted by the Roman lawyers and their modern followers. The nature of this basis has been fully expounded by Professor Maine, and is well known to consist in the gradual evolution of the mental and moral aspects of the contract from the formal and mechanical elements which, in the earliest times, essentially characterized it. There is (2) the basis indicated by the variety of the formal acts by which the making of a contract may be legally authenticated. This is the mode which has been most popular among English text-book writers, who usually start their investigations into the law of contract by distributing all contracts into 'contracts under seal' and 'contracts not under seal.' There is (3) the basis furnished by the material contents of the contract, that is, by the social or other purposes which the contract has to serve."¹ It is logically convenient to arrange the various kinds of contracts in the following classes: first, as "principal," that is, entered into without an ulterior object, and as "accessory," that is, entered into only for the better carrying out of a principal contract; second, as personal, heritable, or real; third, as simple or conditional; fourth, as limited or unlimited (with

¹ Amos, *A Systematic View*, p. 214.

reference to the term of payment or performance); fifth, as conjunctive or alternative; sixth, as several, conjoint, or solitary; seventh, as divisible or indivisible. A careful study of the jurists will reveal eleven methods by which contracts may be extinguished, viz.: (1) payment; (2) novation; (3) voluntary remission; (4) compensation; (5) confusion; (6) death; (7) loss of the thing; (8) the resolutive condition; (9) expiration of the term; (10) rescission; (11) prescription.

The writers of the Institutes say that "Having enumerated the kinds of contracts, we may now explain those obligations which do not spring properly from contract; yet, as they do not derive their origin from any wrongdoing, seem to be produced *quasi ex contractu*."¹ The Roman jurists perceived that while, as Gaius has expressed it, obligations as a rule proceed either from contract or tort,² yet there are many acts or facts which may and ought to create a legal tie without any conventions, or the commission of any wrong, or the omission of any duty. The rights which the Roman lawyers thus described as arising *quasi ex contractu*, or more simply, *ex variis causarum figuris*,³ may therefore be described as arising *ex lege*. The essence of the difference between obligations *ex contractu* and obligations *quasi ex contractu* is that the former spring from the agreement of the parties, the latter from voluntary and lawful acts in the absence of any agreement. Ulpian declares: "The praetor says that if a man shall have conducted the affairs of another or what shall have been the affairs of some one at the time of his death, I will give an action on that behalf;"⁴ while Gaius says: "If a person has conducted the affairs of one in his absence, without a mandate, it has been held that they are under mutual liability, and actions have been provided in

Obligations
quasi ex
contractu.

Arise
ex lege.

Ulpian
and Gaius.

¹ *Inst.* 3, 88, 27. pr.

² *Inst.* 3, 88.

³ *Dig.* 44. 7. 1. pr.

⁴ *Dig.* 3. 5. 3 and 1.

Police
Jury v.
Hampton.

Moses v.
Macfarlen.

Not an
"implied
contract."

that behalf which we call actions *negotiorum gestorum*, by which they can mutually proceed concerning what it behooves the one to render the other in good faith."¹ In a leading case the Supreme Court of Louisiana has said: "It is a maxim common to the jurisprudence of all countries that no one is permitted to profit by the labor of another without compensating him for it. . . . On this principle the Roman jurists held that he who acted for another, by transacting his business, or making repairs on his property, could recover the amount of the expenses incurred, or the value of the repairs, provided the acts of the *negotiorum gestor* were necessary and useful to the person for whom he acted. This doctrine has descended to us, and makes a part of the positive legislation of the state."² In *Moses v. Macfarlen*,³ Lord Mansfield said that if the defendant be under obligation from the ties of natural justice to refund, the law implies a debt (not, let it be noted, a contract), and gives the action of *indebitatus assumpsit*, founded on the equity of the plaintiff's case, "as it were upon a contract, *quasi ex contractu*, as the Roman law expressed it." And here let the fact be emphasized that this quasi-contract is not what is often termed in English law an "implied contract," which is, as Maine has pointed out, a true contract while a quasi-contract is not.⁴ "An implied contract is one where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts,"⁵ while a quasi-contract arises, *ex lege*, from voluntary and lawful acts in the absence of an agreement of any kind. According to the French Civil Code,⁶ "quasi-contracts are those purely voluntary acts of man from which there results an obligation

¹ *Dig.* 44. 7. 5.

² *Police Jury v. Hampton*, 5 *Martin*, N.S. 389. Cf. Howe, *Studies in the Civil Law*, p. 271.

³ 2 *Burrows*, 1005.

⁴ *Ancient Law*, p. 343.

⁵ *Lawson on Contracts*, p. 50.

⁶ *Art.* 1371.

towards a third person, and sometimes a reciprocal obligation between two parties."

The statement has been made heretofore that obligations may arise from offenses or quasi-offenses, a distinction not so clearly drawn between these two sources in Roman law as by the medieval and modern civilians. The Institutes give four leading examples of obligations arising *ex delicto* or *ex maleficio*, viz.: *veluti ex furto; aut rapina; aut damno; aut injuria*.¹ The first arose from the unlawful taking of property by a tortious act, either open and manifest, or secret.² The second, from the taking of movables with violence. The third, from culpable injury to the property of another under the special regulations made by the *Lex Aquilia*, probably about 467 u.c., which, according to Ulpian,³ altered all earlier statutes, as well the Twelve Tables as any other law, on the subject of wrongful damage to the property of another. The fourth, in a general sense, from every breach of legal duty; in a specific sense, from all injuries to person and personal rights of which the law would take notice. According to Paul an injury may be suffered either *in corpus* or *extra corpus*.⁴ As examples of obligations arising *quasi ex delicto*, that is, from acts not technically *delicta*, the Institutes⁵ refer to the liability of a *judex* who gave a deliberately unfair decision; to that of the occupier of a room who threw out of it something to the injury of another; to that of one who placed or hung anything over a public way in such a manner as to be a common danger; and to that of a master of a ship or the keeper of an inn or of a stable for any

Obligations
ex delicto.

Furtum.

Rapina.

*Damnum
injuria
datum*.

Injuria.

Examples of
obligations
*quasi ex
delicto*.

¹ *Inst.* 4. 1. pr.

² A man may thus wrongfully take his own property, while, for instance, it is in the lawful possession of his pledgee. Gaius, iii. 204.

³ *Dig.* 9. 2. 1. The Aquilian law, referred to in the Institutes, 4. 3, is commented upon in the second title of the ninth book of the Digest. A valuable commentary has lately been published upon it by Dr. Grueber, of the University of Oxford.

⁴ Sentences of Paul (Tissot), 5. 4. 1.

⁵ *Inst.* 4. 5. pr.; *Ibid.* 1. 2. 3.

damage or loss through theft committed in the ship, inn, or stable; "that is, if it is not he himself who has committed the wrongful deed, but some one employed in the service of the ship, inn, or stable." As the principal "is in fault in employing dishonest persons as his servants, he seems to be bound *quasi ex maleficio*." And in the same category may be placed the liability in Roman law of the master for torts committed by his slaves; of the owner of an animal for damage done in a manner contrary to its disposition; and of the *paterfamilias* for torts of the *filius familias*.¹ From such data were drawn the general rules of the later civil law on this subject, rules that include and illustrate a large part of the modern law of torts and negligence as understood in England and the United States. In a case that occurred in 1894² Lord Halsbury stated that torts are divisible into two classes, delict and quasi-delict, but he doubted whether in dealing with an English case a judge would feel at liberty to adopt the distinction. The correspondence of Lord Halsbury's classification with that of the Institutes is in a large measure accounted for by the fact that English remedial law reproduced in its larger features, in the course of its historical development, the phenomena that occur in the earlier Roman remedial system.

Origin of
modern
law of torts
and neg-
ligence.

Gaius and
legis
actiones.

From the long-lost Institutes of Gaius, recovered in 1816, is drawn the only connected account of the *legis actiones*, the name given to the system of judicial procedure that prevailed at Rome until the substitution of that *per formulas* by the Aebutian and Julian laws. In addition to the *legis actio per sacramentum*, Gaius (after giving an account of that *per iudicis postulationem*, in a passage which is lost) mentions that *per conductionem*, that *per manus injectionem*, and that *per pignoris capionem*. The most important of these five actions

¹ Sohm, *Inst.*, p. 331.

² *Palmer v. Wick, etc.*, Steam Shipping Co., A.C. 333.

was the *sacramentum*, — considered by Maine the undoubted parent of all the Roman actions and consequently of most of the civil remedies now in use in the world,¹ — which began with a feigned combat over the property involved, ended by the praetor who interposed the authority of the state for the preservation of the peace. The praetor then referred the matter in dispute to a private person (*judex*), who, as an arbitrator, exercised functions somewhat analogous to those of an English jury. After it was settled that this action would lie upon one particular state of facts, it was assumed to be necessary that other debatable causes of action must come into the same category or the action would not lie. Thus the defect of this, as of all early forms of action, was the technicality and literalism with which it was applied; the slightest error was fatal; whoever failed in the smallest item lost his case.² That difficulty was increased by the fact that only Roman citizens could avail themselves of these ancient forms. Therefore the *praetor peregrinus* was compelled, with the growth of the foreign colony at Rome, to substitute for the *legis actiones* a formulary process; for the *judex* of the legal system he substituted the *recuperatores* or arbitrators, and did not undertake to decide issues himself. For the strict formalism of the actions he substituted a formula or writ containing written instructions to the arbitrators that, in the event they found the facts to be so and so, they should order the defendant to do such and such acts. The process of change was a gradual one; as the gap between the citizen and the alien could not be closed in a day, the substitution of the new for the old process, begun by the *lex Aebutia*, was only completed a century and a half later by the *leges Juliae*.³

The *sacramentum*.

Functions of the *judex*.

Technicality and literalism.

Substitution of formulary process.

¹ *Early History of Institutions*, p. 252.

² Gaius, *Inst.* 4, 30.

³ "The exact effect of the *lex Aebutia* and the *leges Juliae* is not clear. Whether, as Gaius says, those statutes abrogated the *legis actiones*, or, as is now generally understood, only introduced the formulary process, leaving the older remedies to their chance of survival in competition with the new, it is clear that by the time Gaius wrote the *legis actiones* were all but obsolete." Street, *Foundations of Legal Liability*, iii. 18, note 7.

Praetor
empowered
to invent
new forms
of action.

Subtle use
of fiction to
create new
rights.

Formulary
system
finally
wiped out
by Con-
stans.

By the formulary process the praetor was endowed with the power to invent new forms of action, just as the English chancellor was at a later time permitted to issue writs in *con-simili casu*. At Rome as in England this new power did not involve either a radical departure from the primitive system or a disregard of all form. Under the formulary process as under the English writ system the actions depended on the form of the writ and were capable of being distributed into different classes of actions in the same manner. But, as the formulary process no less than the *legis actiones* was very literally interpreted, it was finally discredited by the ingenuity of lawyers and had to be laid aside. Not, however, until it had wrought a considerable advance in the theory and practice of remedial law. In many instances by the subtle use of fiction the praetor was able so to extend the ancient remedies as virtually to create new rights; he was also able to make effective various rights that had been without remedy; and he could recognize as valid certain defenses (*exceptiones*), which could not have been set up at law. And while the formulary system was in full vigor the praetor had undertaken to decide certain classes of cases, without the assistance of *judex* or arbitrator in proceedings, known as *extraordinariae cognitiones*, analogous to the extraordinary jurisdiction of the English chancellor. Under the Empire this extraordinary process made serious inroads on the formulary system until Diocletian, A.D. 294, authorized all provincial magistrates to decide cases for themselves instead of submitting them for hearing to others.¹ Finally the formulas with their syllabic snares and pitfalls were entirely wiped out, A.D. 342, by Constans, who extended the system of *extraordinaria judicia* throughout the whole Empire.² Thus were questions of form thrust into the background and matter of

¹ Cod. 3. 3.

² "Juris formulae, aucupatione syllabarum insidiantes cunctorum actibus radicibus amputentur." Cod. 2. 58.

substantive principle brought to the front under a system in which magistrate and judge are henceforth the same person.¹ To such a magistrate the plaintiff furnished a short statement of his case, usually in writing but not necessarily so, which was decided, after the parties had been heard by themselves or advocates, on the facts as set forth in the statement of the cause of action and established by the proof. Through all these changes in remedial law the general principles of the substantive law as to obligations arising from offenses and quasi-offenses lived on; and as they appear in the codes of France, Spain, and Louisiana may be summarized as follows:

Magistrate and judge henceforth one person.

Survival of general principles as to obligations.

"1. Every act of a man which causes damage, in the legal sense, to another, imposes an obligation on him by whose fault it happened to repair such damage. Summary.

"2. Every person is thus responsible for the damage he occasions, not merely by a positive act of commission, but for his negligence, imprudence, or want of skill, according to the circumstances of the case.

"3. Every person is responsible not only for his own wrong or neglect, but for the wrongs or neglects of the persons in his employment or under his control, under regulations and limitations established as matter of public policy. 4. The owner of an animal, even, may, in certain cases, be liable for injury done by such animal."² The Roman jurists clearly understood that he only causes a legal injury who does what he has no right to do;³ that damage may be done by such pure accident that it will not contain the element of actionable injury;⁴ that in determining whether a wrongful act is the proximate cause of an injurious result, the question is not merely one of time and space, but of immediate and efficient

¹ In the Institutes the term "judex" means a magistrate deciding a case.

² Cf. Howe, *Studies in the Civil Law*, pp. 289-300.

³ "Nemo damnum facit, nisi qui id facit quod facere non habet." *Dig.* 50. 17. 155.

⁴ According to Paul there is no actionable injury where the master of a slave, intending to strike him, by mere accident strikes a freeman. *Dig.* 47. 10. 4.

causation in the juridical sense;¹ that, in reasoning as to proximate cause, its logic should be connected with that of contributory negligence. According to the rule as formulated by Pomponius, he who suffers damage by his own fault is not considered to have suffered at all.²

Roman
phenomena
reproduced
in English
remedial
law.

While there has been no copying and very little of conscious imitation, the remedial law of England has reproduced substantially the same phenomena while passing from an iron rigorism of symbolic form to the comparatively simple procedure of the present time. As a recent inquirer has graphically stated it: "Eleven hundred years had elapsed since the founding of Rome,—a period sufficiently long to serve as a reminder that Roman law was not, as is sometimes supposed, marked by any notable rapidity of growth. From the union of the Saxon heptarchy under Ecgerht (A.D. 1827) to the passage of the Judicature Act (A.D. 1873) is a somewhat shorter period, during which English remedial law passed through approximately the same stages."³ The three stages in the transition are (1) formalism in actions; (2) actions based on the writ process; (3) abolition of forms. While it cannot be gathered together under concise and suggestive names of actions, such as Gaius has preserved for us, there is an abundance of fragmentary evidence of a stage of strict formalism in English law corresponding with the Roman *legis actiones*, a stage of which the remedy of distress, corresponding with the Roman *pignoris capio*,⁴ has survived as a striking illustra-

Three
stages in
the trans-
ition.

Distress as a
survival of
self-help.

¹ See also Gaius, 3, 2, 11; and, on the same line, the Nitro-glycerine case, 15 Wall. 524. Cf. Celsus, *Dig.* 9. 2. 2. 7. 7; Paul, *Ibid.* 2. 30. 3; *Railroad v. Kellogg*, 94 U.S. 469.

² "Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire." *Dig.* 50. 17. 203. See also the example put by Paul in his comments on the Aquilian law. "If a slave were killed by persons who were throwing javelins for amusement, the Aquilian action would lie. But if, while others were throwing javelins in a place devoted to such exercises, a slave crossed that ground, the action would not lie, because the slave should not have walked over the training field at an unseasonable time." *Dig.* 9. 9. 4.

³ Street, *Foundations of Legal Liability*, iii. 21.

⁴ Noted by Gaius, but without much detail. *Inst.* 4. 26-29.

tion of the antiquity and permanence of the right of self-help. The formalism of early English law is to be found, however, not so much in the action as in its formal modes of trial and proof known as compurgation, ordeal, witnesses, and battle,¹—the ceremonies attending the last bearing an analogy to the *actio sacramenti* which has excited interest. After the Normans had conquered an island world in which judicial power was vested in a series of local popular assemblies, many of which were private and feudal, the judicial administration was centralized by the king's writ that drew into one central and royal court jurisdiction over nearly every kind of contention.² As copies of the writs penned by the royal secretary (*cancellarius*) were preserved and used as precedents, their forms became more rigid; and after they had won a secure place on the *registrum brevium* they were, upon the payment of the proper fee, issued to all applicants. Such writs as required in their framing and issue magisterial discretion (*brevia magistralia*) could only be had on application to the chancellor himself. Finally the writs of which the chancery thus became the source shaped the form of actions upon the common law theory that there is no right of action unless there is a recognized form through which it may be enforced. And so in England as at Rome the transition is from one system of formalism to another, the latter being of a newer and higher type. As at Rome the *legis actiones* gave way to what was at first the flexible formula of the praetor, so in England "the old oral and traditional formalism is in part supplanted and in part reënforced by a written and authoritative formalism."³ Before Glanvill wrote (*temp.* Henry II.) there could hardly be said to be any register, and hence there was no well-

Trial by battle and the *sacramentum*.

Centralization of justice and the writ process.

Chancery as the source of writs.

Oral formalism supplanted and reënforced by written.

¹ Cf. Thayer, *Preliminary Treatise on Evidence*, 16–46, as to their history.

² As to the centralization of justice and the writ process, see Taylor, *The Origin and Growth of the English Constitution*, I., 316 sq.

³ Pollock and Maitland, *History of English Law*, ii. 558, 2d ed.

Henry III.
and the
golden age
of forms.

Bracton
and re-
medial law.

Equilibrium
between
right and
remedy dis-
turbed.

Power of
chancellor
curtailed.

defined body of writs.¹ Not until the close of the reign of Henry III. do we reach the golden age of forms, — the number then actually in use was at its maximum. “Very few of the writs that had as yet been invented had become obsolete, and, on the other hand, the common law’s power of producing new forms was almost exhausted.”² It is not therefore strange that Bracton should have fancied that in his time royal remedial justice was equal to then existing conceptions of legal right; that *remedium* was in exact equilibrium with *ius*. He says: “There are certain writs framed upon particular cases which are granted as of course and which have been approved by the common council of the whole realm; and these can by no means be changed without their consent and will [*i.e.* of the council]. . . . There are certain other [writs] called *magistralia*. These are often varied according to the varying circumstances of the cases disclosed in the pleas of the plaintiff and defendant.”³ There are writs, he says, to correspond with all rights or sorts of action. “*Tot erunt formulae brevium quot sunt genera actionum.*” That equilibrium between right and remedy which thus appeared to Bracton so necessary and permanent was, however, soon to be disturbed through political events. As a weak or unscrupulous king, acting through a chancellor as his tool, could easily become a menace to the liberties of the subject, it was provided, when the royal power was put into commission by the Provisions⁴ of Oxford (1258), that the chancellor should not issue writs other than those “of course” without the approval of the executive council as well as of the king. So determined was the dispo-

¹ Some existed, however, from the time the Norman kings first began to encroach upon the communal and feudal courts. Glanvill’s book is written about them. See Bigelow, *Placita Anglo-Norman*, Introd., p. xxvi; *Register of Original Writs*, by F. W. Maitland, 3 Harvard Law Review 107.

² Maitland, *Register of Original Writs*, pp. 169, 175.

³ Bracton, 413 b.

⁴ For the history of the Provisions, see Taylor, *The Origin and Growth of the English Constitution*, i. 401, 448, 498; Stubbs, *Select Charters*, p. 389.

sition to make permanent the inhibition thus placed by the Provisions on the power of the chancery to issue new writs that, in 1285, Parliament deemed it necessary to make a relaxation by providing in a famous statute¹ that thereafter, when no writ was found for a case similar in its facts to one for which a writ already existed, the clerks should frame a writ in *consimili casu* with the existing writ; or, if the clerks could not agree upon a form, the matter should be referred to the next Parliament. From its establishment far down into the reign of Henry III. the chancery could issue writs in entirely new cases; henceforth it can issue writs only in cases that are clearly within the principle of existing writs, and when there is any doubt, the matter must be referred to Parliament. Passing now to the classification of writs in the common law system, we must turn to Bracton, who, writing in the shadow of Roman law and using Roman terms, says that all actions are either *in rem*, *in personam*, or mixed,² — divisions that had evidently filtered from the Institutes through the mind of the medieval commentator Azo,³ who gives these as the most important. According to the Roman classification, which turned upon the conception of legal obligation or duty, the action *in personam* lay against a particular person, ascertained either by the fact that he has made a contract or has done an act constituting a delict or tort, while the action *in rem* lay primarily to enforce such rights as are available not against a particular individual but against the whole world, and derivatively against the thing itself. The action *in rem* is therefore either an impersonal action or an action against the thing itself. And as the Roman law had its mixed actions, so English law was

Stat. West.
II., c. 24,
and its
effect.

Bracton's
classifica-
tion of
writs.

Roman
classifica-
tion based
on legal
duty.

¹ Stat. West. II., c. 24.

² "Sciendum quod omnium actionum sive placitorum (ut inde utatur aequivoce) haec est prima divisio, quod quaedam sunt in rem quaedam in personam et quaedam mixtae." Bracton, 101 b.

³ Maitland, *Bracton and Azo*, pp. 134 sq.

Blackstone followed Roman institutional writers.

Actions personal, real, and mixed.

Dying out of real actions.

compelled to classify as mixed certain actions that partook of the nature of both. Blackstone,¹ following the Roman institutional writers, tells us that "in England, the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds: actions personal, real, and mixed. Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs; and they are the same which the civil law calls '*actiones in personam, quae adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere.*' . . . Real actions (or, as they are called in the Mirror, *feodal actions*) which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments in fee simple, fee tail, or term of life. . . . Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained." If the question be asked why it was that a large part of the really English law which Bracton undertook to expound is found in connection with the subject of real actions, while in Blackstone's treatise only the personal actions are deemed worthy of attention, the answer must be that the former were dying out. When Chitty wrote (1808) the old real actions were practically obsolete, and in the succeeding generation such vestiges of them as remained were abolished by statute.² The procedure incident to their prosecution was too cumbersome. If right

¹ 3 Com., pp. 117, 118.

² 3 & 4 Will. IV., c. 27, § 36. The then practically obsolete writs for the establishment of dower rights in favor of which that statute made a reservation were of course done away with by the Judicature Acts. Cf. 23 & 24 Vict., c. 126, § 26.

and remedy had always been in such equilibrium as is indicated by the maxim *ubi jus ibi remedium*, there would have been no growth, no changes would have been necessary. Such equilibrium could not continue because, as form is not elastic, any system of remedial law based upon its coördination with *jus* must ever be yielding to the pressure of social growth in an advancing society.¹ Down to the last years of Henry III., which have been called the golden age of forms, the number actually in use was at its maximum. As stated heretofore, very few of the writs that had as yet been invented had become obsolete, while, on the other hand, the common law's power of producing new forms was almost exhausted.² Under such conditions the most efficient instrument found for preserving the balance between legal right and remedy was the action on the case whose underlying principle supplied a means for the extension of the various remedies. It fertilized all the old stocks like deceit, debt, and detinue, as well as trespass, giving new life to each of them. And yet, potent as was the influence of case in supplying a new remedy "whenever a new injury is done,"³ its growth was hindered by the fact that all forms of actions tended towards finality and fixity as English law became to be more and more a *lex scripta*. The result was that as litigants found it more difficult to obtain redress through common law actions they began to appeal by petition to the ultimate fountain of justice, to the king in council. One of the leading objects of dividing the petitions which came before the council into distinct classes was to sever from the general mass of business those special "matters of grace and favor" which could only be answered after reference

Procedure too cumbersome.

Equilibrium between right and remedy disturbed by social growth.

Influence of action on the case.

Its growth hindered.

Appeals to the king in council.

¹ "Before this can happen, social pressure must increase until the tension of form can no longer resist it. Growth of remedial law follows, and cannot precede, social growth." Street, *Foundations of Legal Liability*, iii. 48.

² The Statute of Westminster II. begins with the recital: "Considering that divers of this realm are disinherited by reason of the fact that in many cases where remedies should have been had, there is none provided."

³ 3 Blackstone, p. 123.

Beginning
of independent
equitable juris-
diction.

Ashby v.
White
stimulates
action on
the case.

to the king in person. When, early in the reign of Edward III., the chancellor ceased to follow the court as one of the royal retinue, his tribunal began to acquire a more distinct and substantive character. And from the twenty-second year of that reign, in which all petitions of grace and favor were recognized as his province, his separate and independent equitable jurisdiction began to grow in power and importance,¹ by which must be understood "the extraordinary interference of the chancellor, without common law process, or regard to common law rules of proceeding, upon the petition of the party grieved, who was without adequate remedy in a court of common law."² Stimulated by the rivalry resulting from the growth of the new jurisdiction, the law judges began to perceive that if more attention was given to the action on the case there would be less occasion to resort to chancery,³ until finally, in *Ashby v. White*,⁴ Holt, C.J., boldly maintained in a dissenting opinion that prevailed in the House of Lords, that case may be used to redress a legal wrong though the particular facts may never have arisen before. "It is not," said he, "the novelty of the action that can be argued against it, if it can be supported by the old grounds and principles of law." While trial by jury has no doubt largely contributed to the same result, there can be no doubt that the survival of the common law forms of action to our own time has been largely due to the principle embodied in the action on the case whereby the ancient remedies have been extended. "One who casts his eye over the field of English remedial law during the five hundred years which ends with the passage of the

¹ See Taylor, *The Origin and Growth of the English Constitution*, i. 250, citing Rot. Claus., 38 Edw. III.; Hardy, *Close Rolls*, i., Pref. xxxiii.

² Campbell's *Lives*, i. 7.

³ In 1481 Fairfax, J., speaking of the action on the case upon assumpsit, said that if more attention were given to its extension there would be less occasion to resort to chancery. Y.B. 21 Edw. IV., 23, pl. 6.

⁴ Holt, K.B. 524; 2 Ld. Raym. 938, 1 Bro. P.C. 45 (in House of Lords), also 14 How. St. Tr. 695.

Judicature Acts will thus see two great factors working in entirely different fields for the extension of that law. In the equitable forum is the conception of the single civil action as a sufficient instrument for the redress of all grievances of which that court has jurisdiction. In the legal forum we see the principle embodied in the action on the case, fertilizing the old stocks and causing them to put forth anew."¹ And yet, potent as were these agencies, directed to a common end in different fields, they proved to be inadequate. A time came when, in England as in Rome, the evolution of remedial law culminated in the final abolition of the forms of action and in the establishment of the action on the facts of the case. The chief difficulty that arose in England out of a complex system of tribunals, administering different codes of law through widely different methods of procedure, was that embodied in the conflict between law and equity, whose divergences were so great that it was often said that a litigant might be pronounced clearly right on one side of Westminster Hall and clearly wrong on the other. In 1850 a royal commission appointed to consider the reform of the law courts finally reported that "a consolidation of the elements of a complete remedy in the same court was obviously desirable, not to say imperatively necessary, to the establishment of a consistent and rational system of procedure." To accomplish that end was enacted the Supreme Court of Judicature Act of 1873,² which provided that the courts enumerated therein "shall be united and consolidated together, and shall constitute, under and subject to the provisions of this act, one Supreme Court of Judicature in England." Thus was finally accomplished that fundamental reform of procedure both in the Court of Chancery and in the Courts of Common Law, which had been the constant aim of Bentham and his followers, through the establishment of a single court in every division

Two great factors in English remedial law.

Final abolition of forms of action.

Royal commission of 1850.

Judicature Act of 1873.

¹ Street, *Foundations of Legal Liability*, iii. 54.

² 36 & 37 Vict., c. 66.

of which every kind of right known to the law of England is recognized, and where every kind of remedy for the enforcement of rights may be obtained.¹ There was no attempt to abolish the distinction between legal and equitable rights. While equity ceased to exist as an independent system, it bequeathed its principles to the system into which it was absorbed. The terms "legal" and "equitable" are worked into the fiber of all legal thought. The cardinal purpose of the great reform was not to create new rights, but to give a new means of enforcing the old, through the abolition of legal forms and the consolidation of legal and equitable modes of procedure.² In the application of the new remedial system the principle is accepted as fundamental that the legislation in question did not intend or attempt to alter the substantive law at all. In England as at Rome, adjective law, after assisting substantive law to a state of independence, is severed from it and passes into the background. In the course of legal evolution procedure loses its primitive importance; the ancient forms of action give way to a single civil action on the facts as an instrument for the enforcement of legal and equitable rights.

In analyzing such a right as substantive law creates and defines, Holland resolves it into four elements: (1) the person entitled; (2) the object; (3) the act of forbearance; (4) the person obliged. The first and last terms in the series describe persons, — the former being the person in whom the right resides, the latter the person against whom the right is available. Persons are thus the subjects of duties as well as of rights. For the benefit of persons duties are created, and it is on persons that duties are imposed. Such persons are,

Distinction
between
legal and
equitable
rights
preserved.

Substantive
law un-
altered.

A legal
right
analyzed.

Persons the
subjects of
rights and
duties.

¹ Cf. Dicey, *Law and Opinion in England*, pp. 206-207.

² *British South Africa Co. v. Companhia De Mocambique* (1893), A.C. 602; *Macdonald v. Tacquah Gold Mines Co.*, 13 Q.B.D. 535, 539; *Westbury-on-Severn Rural Sanitary Authority v. Meredith*, 30 Ch. D. 387; *Lattin v. McCarty*, 41 N.Y. 107.

in contemplation of law, either normal or abnormal. A normal person must be, not a monster,¹ but a human being born alive (*vivus*).² For certain purposes existence begins before birth. "An infant in *ventre sa mere* is supposed to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it."³ A normal person must be such a human being as is regarded by law as capable of rights and duties, or, to use a Roman term, as having a *status*, which was not possessed by a slave who had not, as such, either rights or liabilities. On the day of his manumission, according to Modestinus, "*inceptum statum habere*";⁴ before manumission, as we read in the Institutes, "*nullum caput habuit*."⁵ In Roman law the idea of legal personality was summed up in the word *caput*, which, going beyond mere status, signified personality of the complete or ideal kind, a conception that was the source of the rules worked out as to the loss or impairment of its privileges, or as to the diminution of the honor in which it was held. According to Paulus, in this ideal personality was embodied liberty, citizenship, and family,⁶ elements that might be impaired or lost in three ways. Whether a person is capable of all the rights and duties defined by law must depend upon the freedom, the sex, the sanity, the maturity, the citizenship, and the like of the individual under the laws of the sovereignty by which such capacities are defined. The normal person is therefore a natural person who is *sui juris* and as such endowed with full capacity for all rights and duties recognized by law. Abnormal persons are either natural or artificial. An abnormal natural person

A normal person.

Status in Roman law.

Caput.

Upon what capacity depends.

An abnormal natural person.

¹ *Dig.* 1. 5. 14. 1. 16. 38.

² *Ibid.* 1. 16. 129.

³ 1 Blackstone, 130. Paulus says, "Qui in utero est perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur." *Dig.* 1. 5. 7.

⁴ *Dig.* 4. 5. 4.

⁵ 1. 16.

⁶ *Dig.* 4. 5. 11. The first, *capitis deminutio maxima*, was the loss of liberty, as where a Roman citizen became a slave by condemnation for crimes; the second was *capitis deminutio media*, or loss of citizenship simply; the third, or *minima*, resulting from separation from the agnatic family.

is one in the enjoyment of an exemption or under a disability, as an infant, feme covert, lunatic, criminal, alien, a person in certain professions, as a soldier or barrister, a person in a state of slavery, or a person who has suffered civil death by entering into religion. An abnormal artificial person is an ideal being created by law, a legal entity capable as such of possessing certain rights and incurring certain liabilities. As conquest and expansion were followed by municipal organization, the Roman conception of a corporation as a juristic person distinct from any of its members became more and more defined. Under the refining hand of the Antonine jurists, in some cases the emperor, in others the magistrate, was considered in his official capacity as a juristic personality, in harmony with the English doctrine of a corporation sole. That a juristic personality might be of the public kind was attested by the state itself, called in its proprietary capacity *fiscus*, and by the municipal corporations. That it might be of the private kind was attested by various *collegia* and *corpora*, which were considered as universities, such as pontifical colleges, ancient companies of artisans, and industrial societies.¹ In addition must be mentioned mutual benefit² and burial societies, and political and social clubs, under strict police control. Whatever may have been the rule in earlier times as to state recognition as a prerequisite to juristic personality, the later Roman law certainly required that a corporation must be established or recognized by legislative authority, general or special. The right to organize such a body, Gaius declares, is not permitted to every one; the matter must be governed by statute, decree, or imperial constitution.³ When thus con-

An abnormal artificial person.

Roman conception of a corporation.

Public and private.

Necessity of legislative recognition.

¹ See Warner v. Beers, 23 Wend. (N.Y.) 103, 122, for a clear statement of early Roman law on this subject.

² In 1701 there was found at Rome a documentary report of a protracted suit (*lis fullonum*) against an association of fullers with regard to water rates. Salkowski, p. 56.

³ "Neque societas, neque collegium, neque hujusmodi corpus, passim omnibus habere conceditur: nam et legibus et senatusconsultis et principalibus constitutionibus ea res coercetur." Dig. 3. 4. 1. pr.

stituted the juridical entity became distinct from any of the natural persons that composed it; they were exempt from its obligations, which were corporate obligations. Ulpian says: "If anything be owed to a *universitas*, it is not owed to the individual members; and the individual members do not owe what is due by the *universitas*."¹ Or, as Marcian explains, the property of a city belongs to the community itself, and not to any individual within it.² The classical jurists perfectly understood that the juristic person would still exist after all its members had changed, or even when the number became reduced to one. As those who were permitted to form a corporation were supposed to have created a miniature republic, then, as now, in the absence of a contrary rule, its action was to be governed by a majority of the corporators.³ The corporate character thus imparted to a group of persons was extended finally to a mass of property devoted to pious uses, the totality being known as *pia causa*, a foundation that began a wider development after the accession of the Christian emperors.⁴ From that source has been drawn many of the rules that regulate every establishment instituted for religious and charitable purposes, for the relief of necessitous persons, or for the advancement of science. From that source the doctrine of pious uses appears to have flowed into the law of England, and to some extent into that of the United States. As under Roman law retroactive state recognition might be given to such institutions, it has been settled here that a valid bequest or devise may be made for pious uses to

Immortality
and in-
ternal gov-
ernment.

*Pia
causa.*

¹ *Dig.* 48. 18. 1. 7, § 1.

² *Ibid.* 1. 8. 6. 1.

³ Such is the opinion of Ulpian. *Dig.* 50. 17. 160. Gaius says: "For those who are permitted to have a corporation, it is proper, after the example of a republic, to have common property, a common exchequer, and a representative or syndic, by whom, as in a republic, what ought to be done in common may be done." *Dig.* 1. 8. 1.

⁴ When authorized by the state, such foundations are considered as moral persons; and it seems that such authority might be so given after their establishment as to have a retroactive effect. Mackeldey, *Roman Law*, § 157.

A succession
as a legal
entity.

a legal entity to be established by the state after the testator's death.¹ The idea of juridical personality in the nature of a foundation has also been extended to those complex masses of rights and duties, sometimes treated as property, which cluster around a man as a result of the various circumstances of his life, and which are transferred from him, so far as they are capable of transfer, by some form of universal succession.² As a totality or estate it consists of all the rights and liabilities of the deceased, and as such it may acquire new rights and incur new liabilities. While this theory has been combated by Savigny and Sohm, the latter admits that it is the view most generally accepted.³ In England and the United States, as at Rome, all corporate organization rests upon state authority; and everywhere the ideal conception of the juristic person is expressed in substantially the same terms. By an English court we are told that "A corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of law. It has no soul, neither is it subject to the imbecilities of the body;"⁴ by an American, that "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as an incident to its very existence."⁵

English and
American
definitions.

Adjective
private law.

Having now examined all the vital elements that enter into substantive private law, reference must be made to what has heretofore been termed adjective private law or procedure. That part of positive law which defines and thereby creates rights is substantive law; that part which provides a method for their protection and enforcement is adjective or remedial

¹ *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Peters 100, 139; *Milne v. Milne*, 17 La. 46. Cf. Howe, *Studies in the Civil Law*, p. 158.

² Described by the phrases "succedere per universitatem," "in universa bona." (*Dig.* 12. 2. 8), "adquirere per universitatem" (*Gaius*, 2. 97).

³ Sohm, *Inst.*, p. 421.

⁴ The case of *Sutton's Hospital*, 10 Rep. 32 b.

⁵ *Dartmouth College v. Woodward*, 4 Wheat., p. 636.

law. The fact has been heretofore emphasized that, distinct and familiar as the division now is between substantive and adjective law, it is very recent in origin. In the early stages of legal growth the two elements appear to be inseparable. It has been said that substantive law was born of procedure, being secreted, as Maine has expressed it, in the interstices of form.¹ And yet it is impossible to accept the views of those writers who intimate that an elaborately organized procedure may precede a clear recognition of the rights it is intended to protect. In answering the contention that law is concerned more with remedies than with rights, Holland declares that "It would be as reasonable to say that a field consists in its hedges and ditch rather than in the space of land which these inclose. In point of fact, a right must be recognized at least as soon as, if not before, the moment when it is fenced around with remedies."² In archaic law the substantive rules defining rights are from the outset enveloped in formalism of procedure, and as the tribunals, from time to time, make changes in such rules, they appear to be modifying only the methods through which they are enforced. Thus it may be said that adjective law assists substantive law to a state of independence as in the course of legal development procedure sinks into the background and loses its primitive importance. As a comparative study has been made already of that process as worked out at Rome and in England, it need not be repeated here. Suffice it to say that before the authority of the state is established, — as in the heroic age of Greece which is characterized by "the omnipotence of private force, tempered and guided by family sympathies, and the practical nullity of that collective sovereign afterwards called the City,"³ — the injured person could obtain from the wrongdoer only such compensation as might be exacted through an act of revenge. That unsatisfactory means of redress known as

Distinction between substantive and adjective law recent.

Law not concerned more with remedies than with rights.

How adjective law assists the growth of substantive.

¹ See above, p. 523. ² *Jurisprudence*, p. 348. ³ Grote, *History*, ii. 126.

Self-help.

self-help is not superseded by judicial process until the corporate person of the organized state has the power to impose its arbitrating power upon the contestants. "For a long time law was very weak, and as a matter of fact it could not prevent self-help of the most violent kind. Nevertheless, at a fairly early stage in its history it begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment."¹ Or, as Maine has expressed it, "the Commonwealth at first interfered through its various organs rather to keep order and see fair play in quarrels, then took them, as it now does always and everywhere, into its own hands."²

How restrained by political authority.

At first self-help is not abolished; it is simply restrained and supervised by political authority. Distress may still be resorted to, but only for certain purposes, and with many safeguards against abuse. As Roman law developed rapidly, distress had become a thing of the past by the time of Gaius, and later authorities take no notice of it. As Teutonic remedial law, on the other hand, developed with painful slowness the elimination of self-help involved a longer process. Nevertheless the process had so far advanced prior to the advent of feudalism that Bigelow, after looking to the testimony of the ancient codes and customs, sees in distress a

Teutonic remedial law.

truly judicial remedy. To use his own words: "But whether private distress once prevailed or not, it is certain that from the time when the Germanic nations first appear in legal history until the period of which we are writing, distraint between freemen of the same *gau*, hundred, or (later) municipality, was lawful only when effected under judicial authority."³ Thus in the end distress was lawful only when sanctioned by state authority; the redress of wrongs must be sought only from the tribunals of the sovereign.⁴ As we have

Distress as a judicial remedy.

¹ Pollock and Maitland, *History of English Law*, ii. 574, 2d ed.

² *Early History of Institutions*, Lect. ix.

³ *History of Procedure*, pp. 202, 203.

⁴ Cf. the edict of Marcus Aurelius, *Dig.* 48. 7. 7.

seen heretofore, the first stage is marked by actions characterized by an iron rigorism of symbolic form; the second, by actions based on the writ process; the third, by the abolition of forms. While concerned primarily with the rights of private litigants, adjective law touches at several points that part of public law which regulates the constitution of courts and the duties of judicial officers through those rules that determine (1) the jurisdiction in which the remedy is to be sought; (2) the process through which the judicial machinery is to be set in motion prior to judgment, and finally (3) the physical means by which such judgment is to be enforced.

Relation of
adjective
private law
to public.

7. The consideration heretofore given to the division of law into private and public, a division arising out of the character of the persons with whom a right is connected, resulted in the conclusion that when both of the persons with whom a right is connected are private persons, the law regulating such a right is "private" law; that when one of the persons with whom a right is connected is the state, and the other a private person, the right is public, and the law regulating such a right is "public" law. As in public law the state is not only arbiter, but is also one of the parties interested, the fact has been recognized that the state, or, as it is usually called, the sovereign, has not only duties, but also rights properly so called, enforceable in its own courts under laws of its own making. When that peculiar element of public law, governing the rights and remedies of a state in its own courts as a quasi-private personality, is deducted, what remains may be grouped under three heads: (1) constitutional law; (2) administrative law; (3) criminal law, substantive and adjective. And yet constitutional law in its widest sense embraces the entire outer shell of the state in which the administrative and criminal law are included. Administrative law has been defined to be "the exercise of

Public law.

Rights and
duties of the
state in its
own courts.

Constitutional, administrative, and criminal law.

Administrative law defined.	political powers within the limits of the constitution," ¹ or as "the functions, or the activity, of the sovereign power." ² And so criminal law, substantive and adjective, revolves within a circle which the constitution of the state defines.
Primary function of constitutional law.	The primary function of constitutional law is to ascertain where the supreme power (<i>suprema potestas</i>) ³ of a state, as embodied in its "internal sovereignty," resides. As that sovereign part of the state is omnipotent, and as such the source of law, its acts can never be illegal. In ascertaining the political center of gravity of any given state heed must be given to the fact whether its constitution is an unwritten body of custom as in England, or one of those written enactments of fundamental principles which have come into being since the assertion of the "rights of man" prior to the French Revolution. Distinct among constitutions of the latter class are those that embody the American invention known
Constitutional limitations.	as constitutional limitations on legislative power. That invention embodies the fundamental difference which divides two kindred political systems, the one resting on the sovereignty of the people as expressed in written constitutions, the other on the sovereignty of Parliament. As king, lords, and commons are in the one system the source of law, their acts can never be illegal, and never in any strict or proper sense unconstitutional. But as in America the people are recognized as the source of law, no enactment of a legislature, state or federal, is valid if it contravenes a provision of a written constitution forbidding its existence. ⁴ In both the English and American constitutional systems the idea of the
Division of functions.	division of the functions of government into executive, legislative, and judicial, which dates back to the time of

¹ Ahrens, *Cours de droit naturel*, ii. 380.

² Pütter, *apud* Holtzendorff, *System*, p. 695.

³ Or, as Aristotle called it, τὸ κύριον τῆς πόλεως. *Polit.* iii. 10. 1.

⁴ For a detailed statement with the authorities, see Taylor, *Jurisdiction and Procedure of the Supreme Court of the United States*, pp. 1-36.

Aristotle,¹ is a dominant one. The importance of such a division was impressed upon the modern world by Montesquieu, who did little more than describe the peculiar form in which it appeared in the English system.² The English states in America adopted the maxim in the same qualified sense in which it was understood in the mother country.

Montesquieu.

When speaking on that subject, Madison said: "On the slightest view of the British constitution we must perceive that the legislative, executive, and judiciary department are by no means totally separate and distinct from each other." Speaking of the constitution of the states, he said:

Madison's view.

"If we look into the constitutions of the several states, we find that, notwithstanding the emphatical, and in some instances the unqualified terms in which the axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct."³ It is the province of constitutional law to regulate all these details, and to prescribe how the cardinal powers shall be distributed and exercised in constitutional systems, no matter whether republican or monarchical.

Province of constitutional law.

As it fixes the succession to a throne, so it regulates the election of a president; as it marks out the geographical area over which the sovereignty of a state extends, so it defines the persons who are subject to its authority. Every constitution prescribes the method of its amendment, whether as in the English system by an ordinary act of Parliament, or by the slow and complicated processes prescribed by the provisions of American constitutions, state and federal.⁴

Flexible and rigid constitutions.

Administrative law, "the total concrete and manifoldly changing activity of the state in particular cases,"⁵ is said to

Administrative law.

¹ *Polit.* iv. 11. 1.

² *Spirit of Laws*, xi., c. 6.

³ *Federalist*, No. xlvi., p. 335.

⁴ As to the difference between "flexible" and "rigid" constitutions, see Bryce, *Studies in History and Jurisprudence*, pp. 136-167.

⁵ Bluntschli, *Die Lehre vom modernen Staat*, iii. 465.

embrace, in its widest sense, the administration of justice, the making and promulgation of laws, the conduct of the government in regulating its foreign relations, the management of the property and business transactions of the state, and the working generally of the complicated machinery through which the state provides for the general welfare.

Aucoc's
definition.

Aucoc defines it to be "the body of rules which regulate the relations of the administration or of the administrative authority towards private citizens";¹ and in his work on *droit administratif* he says: "Administrative law determines (1) the constitution and the relations of those organs of society which are charged with the care of those social interests (*intérêts collectifs*) which are the object of public administration, by which term is meant the different representatives of society, among which the state is the most important, and (2) the relation of the administrative authorities towards the citizens of the state."²

Dicey's
statement.

Under these somewhat vague terms is embodied "that portion of French law which determines (i.) the position and liabilities of all state officials, and (ii.) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the state, and (iii.) the procedure by which these rights and liabilities are enforced."³ Such ideas differ radically from English conceptions, first, because they rest upon the assumption that the government and each of its servants possesses a body of special rights and privileges as against private citizens which are to be fixed on principles different from those defining the legal rights and duties of one citizen towards another; second, because they assume that the ordinary tribunals have, speak-

Divergence
of French
from Eng-
lish con-
ceptions.

¹ "On le définit ordinairement l'ensemble des règles qui régissent les rapports de l'administration ou de l'autorité administrative avec les citoyens." *Droit Administratif*, i., s. 6.

² *Ibid.*

³ Dicey, *The Law of the Constitution*, pp. 309-333. Prior to that great work very little had been written in English as to the wide meaning given to the term "administrative law" as understood upon the Continent.

ing generally, no concern with administrative law (*droit administratif*), which is administered by administrative courts (*tribunaux administratifs*), at the head of which stands the Council of State. If a policeman in France who has broken into a monastery, seized its property, and expelled its inmates is charged with what English lawyers would call trespass and assault, he pleads his exemption while acting under government orders in the execution of its decree dissolving certain religious societies. If his right to be tried before an administrative tribunal is questioned by an attempt to bring him before an ordinary civil tribunal, a "conflict" arises which cannot be settled by an ordinary judge under the ordinary law of the land. The case must go to a court for deciding conflicts of jurisdiction (*Tribunal des Conflicts*), whose business it is to uphold the principle laid down in the earlier stages of the Revolution and still recognized as valid by French law, that "administrative bodies must never be troubled in the exercise of their functions by any act whatever of the judicial power."¹ It thus follows that a party wronged in France by an official must seek relief, not from the ordinary judges under the law of the land, but from some official court. It appears that no officer who has executed the orders of his superiors, without any malicious or corrupt motive, can be made civilly responsible for his conduct. As against that principle stands the cardinal rule of English law that every official, from the prime minister down to a petty constable or tax collector, is under the same responsibility for every act done without legal justification as any other citizen, which responsibility is to be ascertained in the ordinary tribunals under the law of the land.² In the English language there is no satisfactory equivalent for the phrase *droit admin-*

When a
"conflict"
arises.

French administrative bodies free from judicial control.

Accountability of officials under English law.

¹ See Aucoc, *Droit Administratif*, s. 24.

² *Mostyn v. Fabregas*, Cowp. 161; *Governor Wall's Case*, 28 St. Tr. 51; *Entick v. Carrington*, 19 St. Tr. 1030; *Phillips v. Eyre*, L.R. 4 Q.B. 225.

No *droit administratif* in the United States.

United States *v.* Lee.

No man above the law.

istratif for the simple reason that the thing itself has never been recognized. When Tocqueville visited the United States he was not slow to perceive that no such principle entered into the structure of American democracy. In 1831 he wrote to a French judge for an explanation not only of the contrast between French and American institutions in this regard, but also for an authoritative statement of the general ideas (*notions générales*) governing the *droit administratif* of France.¹ In the famous case of *United States v. Lee*,² an ineffectual attempt was made to assert in this country the existence of the French theory of administrative law. In the words of the court, "The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property *as officers and agents of the United States*, and it is appropriated to lawful public uses." The court answered in the majestic tones of Mr. Justice Miller that "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon controverted rights of the citizens as against each other, but also upon rights in con-

¹ See Tocqueville, *Oeuvres Complètes*, vii., p. 66.

² 106 U.S. 196.

troverſy between them and the government, and the docket of this court is crowded with controverſies of the latter claſs.”

As underſtood in England and America, the term “adminiſtrative law” muſt be accepted in that narrow and ſpecific ſenſe in which it is confined to ſuch ſubjects as the collection of revenue, the protection of the coinage and the inſpection of weights and meaſures, the recruitment and equipment of the army and navy, the government of colonies and dependencies, the collection of ſtatistics, the enforcement of ſanitary precautions, the regulation of priſons and aſylums, the ſuperviſion of roads, railways, telegraphs, and canals, the maintenance of museums and libraries, and the organization of ſchools. When conflicts ariſe between citizens and the public officials who are charged with the adminiſtration of ſuch laws, they are ſettled, not in official courts, but in the ordinary tribunals under the law of the land.

Adminiſtrative law as underſtood in England and America.

If the boundary between civil and criminal juřiſdiction exiſted at Rome at all, it was very faintly defined. Roman law continued to treat to the laſt as civil delicts acts now regarded excluſively as crimes. If a concluſion may be drawn from the poſition they held in the later juřiſprudence, theft and robbery were regarded not as public but as private wrongs.¹ The power of puniſhment exerciſed in early times by the king and the *comitia centuriata* was ſhared in later times by the ſenate. While in caſes of ſpecial importance the *comitia* and ſenate exerciſed their powers directly, it was uſually delegated in each caſe to a magiſtrate or a body of commiſſioners. Such commiſſioners (*quaestors*) were appointed at firſt for particular caſes, and afterwards for particular claſſes of caſes.² The ſeries of ſtatutes by which *quaestiones perpetuae* were inſtituted for the trial of particular claſſes of crimes wherever committed, beginning with the

Criminal law.

Its early history at Rome.

Permanent delegations and the

¹ Cf. Muirhead, *Roman Law*, p. 69.

² There are traces in very early times of ſtanding *quaestores parricidii*. Ortolan, *Explication Historique des Instituts*, i. 182-183.

lex Calpurnia,
B.C. 149.

How Roman
criminal
law was
built up.

*Judicia
extraordi-
naria*.

Teutonic
conception
of crime.

Bot and *wite*
in Old-
English
law.

lex Calpurnia, B.C. 149, continued until a number of courses of conduct had been from time to time branded as criminal.¹ Each standing commission was established by a special law, and consisted of a praetor chosen annually, assisted by a sort of jury, sometimes as many as 100 judices, who were summoned for each particular case. By such courts, by the Roman legislative assemblies, and afterwards by the Emperors, was produced, in the course of centuries, a body of law relating to the definition of crimes and also to the procedure for their punishment, the comments upon or the fragments of which fill two books of the Digest (47th and 48th) and one (the 9th) of the Theodosian Code. The large and formless body of rules thus produced drew scarcely anything from the wisdom of the famous juriconsults who illumed every branch of private law. The legislation of the Emperors, which superseded the *questiones*, followed the lines of the old criminal statutes, while substituting for them the simpler procedure of the *judicia extraordinaria*. In the days of Justinian Roman lawyers divided crimes into three classes, according to the manner in which they were prosecuted; namely, *publica judicia*, *extraordinaria crimina*, and *privata delicta*.² In the Teutonic world as at Rome, even violent wrongs were viewed as concerning almost exclusively the person injured, to whom atonement (*compositio*) was to be made in the form of damages. When the idea gained ground that wrongdoing might injure not only the individual but also the state, an additional compensation was provided for the sovereign. Thus in Old-English law *bot* was the compensation due to the person injured by a crime, while *wite* was the fine paid to the king or other lord in respect of an offense.³

¹ Cf. Maine, *Ancient Law*, ch. v.

² Cf. Stephen, *History of the Criminal Law of England*, i. 11-12.

³ Many of the laws abound in provisions fixing the *wer* of different classes of people, and the *bot* due in particular cases. The *wer* is mentioned in the laws of William (1. 7. 9; Thorpe, i. 471), in the *Leges Henrici Primi* (Thorpe, i. 581) and in Henry I.'s Charter to the citizens of London (Select Charters, 108).

As Roman criminal law never assumed such a juristic form as made it capable of general adaptation, the Teutonic nations were driven to original legislation, the first great attempt being represented by the *Constitutio Criminalis Carolina* of the Emperor Charles V., who attempted to provide a criminal law for the whole Empire. During the latter half of the eighteenth century followed the compilation of the national codes for Austria, Bavaria, and many other German states that paved the way for the penal code of all Germany, *Strafgesetzbuch für das Deutsche Reich*, which became effective in 1872. In the Latin world stands forth the "Code pénal" which became law for France in 1810, and which, as a result of French conquest, passed into Italy, Sicily, Holland, Belgium, the Rhine Provinces, Poland, and Switzerland. While the dream that has existed since the time of Bentham, of the codification of the law of England, has not been realized, the penal code drafted by Lord Macaulay for British India in 1834 was promulgated in 1860. In the United States a great work was done by Edward Livingstone, who in 1821 was appointed by the legislature of Louisiana to construct a new code of criminal law and procedure, since widely known in Europe and America as the "Livingstone Code." Prepared in both French and English, it was at once reprinted in England, France, and Germany, attracting wide interest by its remarkable vigor and simplicity, and more especially by reason of its philosophic provisions, which have notably influenced the penal legislation of several countries. "Though the State for which the codes were prepared," says Chief Justice Chase, "neglected to avail itself of the labors assigned and solicited by itself, they have proved, together with their introductions, a treasure of suggestions to which many states are indebted for useful legislation." The body of modern criminal law thus built up is divided into substantive criminal law and adjective

Constitutio Criminalis Carolina.

Penal codes of Germany and France.

Penal code for India.

Livingstone's code.

Divisions of
modern
criminal
law.

Offenses
against the
state.

Against
individuals.

Resem-
blance of
criminal to
civil pro-
cedure in
England.

criminal law or procedure, the former consisting of two parts, a general and a particular. The more general part deals with such subjects as involve the nature of the criminal act; the responsibility of the wrongdoer on the ground of intention or negligence; the extent to which an artificial person may be criminally responsible; facts which negative criminal responsibility, such as tender age, compulsion, idiocy, lunacy, or drunkenness; facts which justify an act otherwise criminal, such as self-defense, and the like; while the special part contains a classification of criminal acts, and specific provisions with regard to the penal consequences of each. The typical modern criminal code divides its list of offenses into those directly committed against the state, — such as tend to the subversion of the government, such as interrupt its friendly relations with foreign powers, such as disturb the public order or obstruct the course of justice, such as debase the coinage, and the like, — and those affecting primarily individuals, — such as violence to the person in its various degrees, defamation of character, offenses against family rights, and offenses against possession and ownership. That body of rules, whereby the machinery of the courts is set in motion for the punishment of offenders, known as adjective criminal law, bears in England a strong resemblance to the stages of procedure in private law,¹ — a resemblance far slighter on the Continent, where the influence of the “inquisitorial” method introduced into Germany by the *Constitutio Criminalis Carolina* still dominates.

¹ For a working out of the analogy, see Holland, *Jurisprudence*, pp. 375 sq.

CHAPTER VIII

LAW BY ANALOGY, OR INTERNATIONAL LAW

1. The essence of the definition heretofore given of law proper or positive law was embodied in the statement that it is enforceable by a sovereign political authority. A law properly so called is a command from a sovereign, an order issued by a superior to an inferior, and "the party to whom it is directed is liable to evil from the other, in case he comply not with the desire."¹ Because they do not proceed from a sovereign political authority armed with the power to enforce them, the set of understandings called international law are not such in the full or proper sense of the term, they are only law by analogy.² The contention of what is known as the transcendental school that international law is positive law rests upon the general assumption that not only does it flow from a transcendental source, but that it has all the qualities of positive law imparted by a lawgiver, — command, and the power to enforce the command. In mitigation of the conclusion that such law is binding upon all nations, *proprio vigore*, ingenious refinements are indulged in by one sect to prove that it must be adopted by the conscious act of each independent community, while another claims that a tacit assent may be presumed from the acts of governments in their mutual dealings.³ The following extracts from well-

Not enforceable by a sovereign political authority.

Claims of the transcendental school.

¹ Austin, *The Province of Jurisprudence Determined*, Lect. 1.

² For that reason what is called international law has been assigned by Austin a place in his positive morality alongside of those customary rules observed among mankind for whose breach no authoritative punishment can be inflicted. *Ibid.* i. 147-148.

³ See the elaborate opinions of Lord Coleridge, C.J., and of Cockburn, C.J., in *The Queen v. Keyn*, L.R., 2 Exchequer Division, pp. 63-239.

Puffendorf's
statement;

Vattel's;

Haute-
feuille's;

known authors will be given as typical expositions of the general theory, without the special qualifications through which some of them have attempted to limit it or explain it away. Puffendorf, a disciple of Grotius who went beyond his master, assuming that the natural *jus gentium* is included in the wider science of *jus naturale*, accepted Hobbes's statement that "the natural law may be divided into the natural law of men, and the natural law of states, commonly called the law of nations."¹ Beyond that Puffendorf declares "there is no other voluntary or positive law of nations properly invested with a true legal force, and binding as the command of a superior power."² Vattel, the disciple of Wolf, who believed that the law of nations was the natural law applied to international affairs, avers that "we call that the necessary law of nations which consists in the application of the law of nature to nations. It is *necessary* because nations are *absolutely* bound to observe it. This law contains the precepts prescribed by the law of nature to states on whom the law is not less obligatory than on individuals. . . . This is the law which Grotius, and those who followed him, called the *internal law of nations*, on account of its being obligatory upon nations in point of conscience."³ Hautefeuille declares that "international law, then, has its foundation in the divine or primitive law; it is from this source that it entirely flows. By the help of this law alone, I firmly believe that it is not only possible but easy to regulate all the relations which exist, or which can exist between the peoples of the world. This common and positive law contains all the rules of justice; it exists independently of all legislation, of all human institutions. It rules peace and war, and traces out in every position of affairs their rights and duties."⁴ Even Bluntschli

¹ *De Cive*, c. xiv, § 4.   ² *De Jure Naturale et Gentium*, II., c. iii., § 23.

³ *Droit des Gens, Préliminaires*, § 7.

⁴ *Des Droits et des Devoirs des Nations Neutres*, Intro.

declares that "the law of nations is that recognized universal law of nature which binds different states together in a humane jural society, and which also secures to the members of different states a common protection of law for their general human and international rights."¹ Such are fair examples of the formulas in which the old transcendental school has been accustomed to contend, (1) that international law finds its origin in some superhuman source; (2) that by virtue of its origin it is really positive law, unchangeable, and binding upon all nations without expressed or implied assent upon their part. The first assumption has been assailed both by the analytical and historical schools, and has been rejected by both because it is at once unnecessary, unscientific, and unhistorical. The second assumption, that international law is positive law, was broken down long ago under the principles laid down by Austin, who defines law, "in the most general and comprehensive acceptation in which the term, in its *literal* meaning, is employed," to be rules of conduct "laid down for the guidance of an intelligent being by an intelligent being having power over him." Under that definition are embraced "(a) Laws set by God to Men, styled Laws of God, or Divine Laws, and (b) Laws set by Men to Men." Laws of the latter class are set by authors, determinate or indeterminate, and are accordingly laws proper or improper. "The matter of jurisprudence is positive law; law, simply and strictly so called; or law set by political superiors to political inferiors."² The essence of Austin's quaint and pedantic description of positive law is that it must be a command, armed with a definite sanction, issuing from a determinate author, — a "law set by political superiors to political inferiors." International law is thus excluded from the domain of positive law because its mandates

Blunt-
schli's.

Why the
assump-
tions of the
school have
been
rejected.

Austin's
definitions.

Why
interna-
tional law
is ex-
cluded from
the domain
of positive
law.

¹ *Das Völkerrecht*, § 1.

² *The Province of Jurisprudence Determined*, Lect. 1.

International law
as "law of
the land."

Mansfield.

Marshall.

The state
and its
external
sovereignty.

do not issue from a common superior armed with power to enforce obedience. As a publicist of our own has well stated it: "The province of international law may be described as a province halfway between the province of morals and the province of positive law. It is law without a forceful sanction."¹ Of course whenever any particular state adopts a part of international law as "the law of the land," it becomes to that extent positive law, because enforceable by the political authority of that sovereignty. In the famous case of *The Queen v. Keyn* it was held that such rules, in order to be binding as state law, must be assented to, as in the case of Great Britain, by an act of Parliament or the judgment of a competent tribunal. The "privilege of foreign ministers and domestic servants depends upon the law of the nations. The act of Parliament of 7 Anne, c. 12, is declaratory of it. All that is new in this act is the clause which gives a summary jurisdiction to the punishment of the infractors of the law."² "If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the court is bound by the law of nations, which is a part of the law of the land."³

2. The statement has been made heretofore that apart from its internal sovereignty, inherent in the people as a whole, and vested in its rulers by virtue of its constitutional law, every state possesses an external sovereignty consisting of its rights as an independent political community to deal with all others of its class upon equal terms under the rules called international law. The international system rests upon the assumption, first, that each state is sovereign and independent,

¹ Woodrow Wilson, *The State*, p. 628.

² Lord Mansfield, *Triquet v. Bath* (1764), 3 Burrows, 1478.

³ Marshall, C.J., *The Nereide* (1815), 9 Cranch 388, 423. Cf. Moore, *International Law Digest*, vol. i., § 2, entitled "Part of the Law of the Land."

and as such coequal with all the rest; second, that territory and jurisdiction are coextensive.¹ By the sweeping away of the transcendental theory of the origin of international law, and by the consequent severance of its connection with what is generally known as divine law, the existing system of rules now regulating the intercourse of nations can find no other basis upon which to rest than that embodied in the alternative proposition of Grotius, which declares that the law of nations derives its authority from the unanimous approbation of all, or, at least, of many nations; its proofs are continued usage and the testimony of the *jurisperiti*.² The states that compose what is called "the family of nations" are in their corporate capacity moral beings, clothed with all the rights and duties that pertain to the individual members of which they are composed. As Pinheiro-Ferreira has well expressed it: "The sole difference there is between citizens united in a single state and the different peoples of the earth is that for a settlement of their differences they first resort to the decisions of their own legislators and judges, while the second rarely submit to such methods, preferring to adjust their conflicts by an appeal to force. And yet as no one will maintain that might makes right, it must be admitted that, prior to the employment of force, there were rights on the one hand and duties on the other. It is these rights and duties, *outside of the sphere of force and legislation*, that constitutes what is called the law of nations."³ In the words of Bulmerineq,⁴ international law "is the totality of legal rules and institutions which have developed themselves touching the relations of states to one another"; in the words

Sovereignty and jurisdiction.

Alternative proposition of Grotius.

States as moral beings.

International law as defined by Bulmerineq;

¹ Taylor, *International Public Law*, pp. 197, 206.

² "Latius autem patens est jus gentium, id est quod gentium omnium aut multarum voluntate vim obligandi accepit. . . . Probatur autem hoc jus gentium pari modo quo jus scriptum civile, usu continuo et testimonio peritorum." *De Jure Belli ac Pacis*, I., c. i., § 14.

³ Cf. Calvo, *Le Droit International*, pp. 93-94.

⁴ *Das Völkerrecht* (in Marquardsen's *Handbuch*, vol. i.), § 1 of the monograph.

By Cairns; of Professor Cairns, "international law is the formal expression of the public opinion of the civilized world respecting the rules of conduct which ought to govern the relations of independent nations, and is, consequently, derived from the source from which all public opinion flows, — the moral and intellectual convictions of mankind." ¹ Lord Coleridge has said that "the law of nations is that collection of usages which civilized states have agreed to observe in their dealing with one another." ² A state which enjoys full external sovereignty, and is a recognized member of the family of nations, is a normal international person. So soon as its separate national existence is recognized it enters at once into the full enjoyment of sovereignty as a corporate person endowed not only with the right to perpetuate its existence by an unbroken succession of new members, but with the attributes and responsibilities incident to "moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life." ³ Such a sovereign has the right to claim independence of and equality with all others of its class, and to exercise jurisdiction throughout its territory. The postulate is fundamental that territory and jurisdiction are coextensive. With a few exceptions a sovereign state has jurisdiction over all persons and things within its territorial limits, and in some instances such jurisdiction over both extends beyond its limits and thus becomes extraterritorial. Among the several attributes of sovereignty may also be noted the rights of a state to

By Cole-
ridge.

A normal
inter-
national
person.

Its attri-
butes and
responsi-
bilities.

Territory
and juris-
diction co-
extensive.

¹ Quoted in Dana's notes to Wheaton's *Elements*, p. 23.

² *The Queen v. Keyn*, L.R., 2 Exchequer Division, p. 154. The author has defined international law to be "the aggregate of rules regulating the intercourse of states, which have been gradually evolved out of the moral and intellectual convictions of the civilized world as the necessity for their existence has been demonstrated by experience." *International Public Law*, p. 86.

³ Maine, *International Law*, p. 33.

maintain diplomatic intercourse with other states, to make treaties with them, and, under certain exceptional conditions, to intervene in their external affairs. Against the exceptional and extraordinary right of intervention stands the normal right of every state to manage its own affairs, internal and external, without interference. It is the privilege of every state to adopt any form of government it deems best suited to its internal wants and conditions, and its identity is never lost so long as its corporate existence survives. While that is preserved neither internal revolutions nor alienations of parts of its territory can diminish any of its rights or discharge it from any of its obligations. The life of a state is not extinguished even by the temporary suspension during a civil war of its authority over those who owe it allegiance. As a state is a moral person with susceptibilities and with a character as such to maintain, it is claimed that another one of its attributes is the right of reputation, which no one should attempt by deed or word to injure or take away.¹

Several attributes of sovereignty.

A state's right to reputation.

3. As each sovereign state is supreme within its territorial limits, with its internal political constitution no other state has the normal right to interfere. International law deals solely with a state's external relations and not with its internal organization. Each state as a corporate body binds itself through the acts of the governmental agents established and authorized by its own constitution. No other state has the right to dictate who such agents shall be or how they shall be constituted; it can only satisfy itself as to the fact that such agents have been duly constituted and that they are acting within the limits of their authority. Thus

Why types of state organization must be examined.

¹ In 1799 certain English subjects, prosecuted for libel on Paul I. of Russia, were punished by fine and imprisonment; and in 1803 an English court convicted Jean Peltier, a French refugee, for libeling Napoleon, then First Consul. See Phillimore, i. 447. A state is not bound to take away from the press or private citizens the right to criticise both foreign states and their sovereigns, — those who abuse the right being subject to responsibility according to the laws of the state to which they belong.

the administrators of every state are forced for their own protection to examine the constitutions of all the states with which they deal so as to be sure that those who represent them are not acting *ultra vires*.¹ For that reason a brief review should be made of the several typical forms of state organization existing in the world to-day.

Sovereign states divided into five classes.

4. Normal international persons or sovereign states are divided into five classes. The tendency which has manifested itself in Europe during the last thirty or forty years to build up great nationalities, through the incorporation of smaller states in more strictly organized wholes, has brought about some notable internal political changes, especially in the constitutions of Germany, Italy, and Austria-Hungary. With such changes clearly in view the statement may be made, that the corporate entities known to international law, which act as independent and sovereign units when dealing with other states, are (1) single or organic bodies like France and Russia; (2) such states, otherwise separate and distinct, as happen to be temporarily or accidentally united in a personal union under a single sovereign; (3) aggregates arising out of real unions like that uniting Hungary with Austria; (4) incorporate unions such as that existing between England and Scotland, and between Great Britain and Ireland; (5) federal unions of the kind embodied in the constitutions of Switzerland, Germany, and the United States. The illustration usually given of a personal union is that which accidentally bound the United Kingdom of Great Britain and Ireland to that of Hanover from the accession of George I. down to the death of William IV., during the five successive reigns in which the king of England was the Elector of Hanover.² The coincidence which thus placed the two crowns on the same head

A personal union.

¹ "It is the business of the state with which a contract is made to take reasonable care to inform itself as to the competency of those with whom it negotiates." Hall, p. 348.

² Cf. Phillimore, i. lxxvi.; Halleck, i. 68; Heffter, § 20; Twiss, i. 46.

by the civil law of succession in each country, did not place either in such a relation to foreign powers that war with the one necessarily involved war with the other, while in treaty engagements with such powers no attempt was made to involve one with the other. When states with an independent existence are permanently united to each other under a single sovereign in such a way as to make them, for the purposes of international law, a single corporate body, the tie becomes a real union as distinguished from a personal one.¹ A typical illustration of a real union is that embodied in the dual monarchy of Austria-Hungary. A *gesammtstaat*, or joint state, may be a greater whole in which the states composing it have lost their international existence, as in the case of Austria-Hungary, or it may be a greater whole in which such states enjoy both a separate and a common international existence, as in the case of Prussia and Denmark as once organized.² The old union of Sweden and Norway was therefore a *gesammtstaat* or real union.³ The term "incorporate union" is usually employed to describe the mighty aggregate that has arisen out of the process through which the little Teutonic kingdom called "Wessex has grown into England, England into Great Britain, Great Britain into the United Kingdom, the United Kingdom into the British Empire,"⁴ — a process that has

A real
union.

A *gesammt-*
staat, or
joint state.

An incor-
porate
union.

¹ "Unio civitatum, sive *perpetua* sit, sive *temporaria*, fit jure (1) vel *societatis* (systema civitatum foederatarum) (2) vel *imperii* (sub eodem imperante). Haec est vel *personalis* vel *realis*." Klüber, I. § 27.

² At that epoch the king of Denmark could treat in behalf of the entire Danish monarchy as a *gesammtstaat*, or joint state; or in behalf of the two Germanic duchies of Holstein and Lauenburg alone; or in behalf of the Danish provinces alone. Cf. Wheaton's *History of the Law of Nations*, pp. 447-448, 457-460, which deals with the effect of the Final Act of 1820 in defining the war-making and treaty-making powers, both of the confederation itself and of its several members.

³ It was so classed by Klüber (§ 27), and by Heffter (§ 26). Wheaton and Phillimore, however, classed the union between Sweden and Norway as a personal one. Twiss, while denying that position, says: "It is not identical with the *real* union which exists between the independent states which compose a *gesammtstaat*, as Norway has not any international existence apart from Sweden."

i. 51-52.

⁴ Freeman, *Norman Conquest*, i. 16.

Treaty-
making
power in
British
Empire.

Palmerston.

Federal
unions.

A *staaten-
bund*.

gradually unfolded itself during the fourteen centuries that have elapsed since the Teutonic conquest and settlement of Britain began. The sole and exclusive power to make treaties, leagues, and alliances with foreign states, binding on the British Empire, is vested in the crown, acting under the advice of responsible ministers, without the advice of Parliament and at their peril. As Lord Palmerston expressed it in tendering a seat in the Cabinet to Mr. Cobden: "You and your friends complain of a secret diplomacy and that wars are entered into without consulting the people. Now it is in the Cabinet alone that questions of foreign policy are settled. We never consult Parliament until after they are settled. If, therefore, you wish to have a voice in these questions, you can only do so in the Cabinet."¹ In classifying federal unions the starting-point is the less strictly organized league resting upon the requisition system, — of the type prevailing before the making of the present Constitution of the United States, — and usually styled a confederated state, or in German technical language a *staatenbund*.² The leading characteristic of such a confederation, so far as its international relations are concerned, is that the state does not entirely surrender to the central power its right of dealing directly with other states. Originally both the Swiss and German confederations belonged to that class. Under the constitution of the new German confederation, embraced in the Final Act of the Congress of Vienna (1815), the right was still retained by each state to declare and carry on war and to negotiate peace with any power foreign to the confederation, and to make its own

¹ Morley, *Life of Cobden*, ii. 231; Spencer Walpole, *Foreign Relations*, p. 117. "It is for Parliament to inquire, to criticise, to support, to condemn in questions of foreign policy, but it is not for Parliament to initiate a foreign policy." Beaconsfield, *Collected Speeches*, ii. 125.

² As to the distinction between the two classes, see J. S. Mill, *Representative Government*, p. 301; Professor Bernard, *Lectures on American War*, Oxford, 1861, pp. 68–72; Tocqueville, *Democracy in America*, i. 250, 265 sq.; Freeman, *History of Federal Government*, i. 11–12 and notes; Heffter, § 20.

alliances, provided that no injury was thereby inflicted upon the confederation itself, or upon any of its members.¹ Even under the existing constitution of the German Empire, while complete jurisdiction over foreign affairs is vested in the imperial government, there is a reservation that certain of the states shall retain the right to deal independently with foreign courts in reference to such affairs as do not involve imperial interests.² By the adoption of the existing constitution of the United States an entirely new type of federal government was created, which writers upon public law have designated a composite state, or supreme federal government, in German technical language a *bundesstaat*. The new federal creation that arose out of the deliberations of the convention of 1787 was both unique and original, and its success has virtually abolished the preëxisting type of federal league, resting on the requisition system. As the *staatenbund* has superseded everywhere the *bundesstaat*, international law has now only to deal with supreme federal governments which for all international purposes appear as single states, representing the nationality of the entire federal body. For that reason the constitution of every federal state should supply its executive with resources adequate to every international demand that can rightfully be made upon it. Unfortunately the Constitution of the United States is not perfect in that respect.³

Existing
German
Empire.

A *bundes-*
staat.

Defect in
Constitu-
tion of U.S.

5. Abnormal international persons are such states as are only part sovereign, or such as have no place in the family of nations. Any state, no matter what the form of its constitution, may, through a voluntary convention or through external pressure it cannot resist, be placed in such a relation

An abnor-
mal inter-
national
person.

¹ Each state also retained its rights of legation as to foreign powers and to its co-states. Klüber, *Oeffentliches Recht des Deutschen Bundes*, §§ 137-143.

² Although such a reservation causes the new fabric to be still designated, in a purely technical sense, a *staatenbund*, it is, as all the world knows, a supreme federal government, a *bundesstaat*, in the highest sense of the term.

³ See Taylor, *International Public Law*, pp. 171 sq.

Part
sovereign
states.

States per-
manently
neutralized.

of dependence to another state as to be deprived of a part of its external sovereignty or have the same for a time entirely suspended. In either event such a state would descend to the class usually designated as part sovereign,¹ and as such continue to be a subject of international law. An illustration of the nature of part sovereign states may be found in the persons of such as have united themselves in that kind of a federal union already described as a *staatenbund*, in which the several states reserved to themselves the right to deal with foreign powers in matters not expressly transferred to the exclusive control of the federal authority. As a necessary result, complete external sovereignty was vested neither in the central government nor in the states out of whose union it arose. It is, therefore, correct to say that the central as well as the local governments in such unions were only part sovereign. Permanently neutralized states such as Switzerland and Belgium cannot be said to possess complete external sovereignty because under the conventions securing their integrity they are deprived of a part of their independence by being denied the right to engage in any strictly defensive warfare, and to enter into any compacts that might involve them in hostilities for any other than purely defensive purposes.² Not until a state is placed by its own act, or by external pressure it cannot resist, in such a permanent and irrevocable position of dependence upon another as to vest in the controlling state the entire direction of its foreign affairs,

¹ The term "part sovereign" has been adopted as more accurate than the term "semi-sovereign," which implies an equal division of the powers of sovereignty between the local and foreign rulers. The latter term seems to have been introduced by J. J. Moser in his *Beyträge zum Völkerrecht in Friedenszeiten*, i. 508. Cf. Twiss, i. 25; Heffter, § 19; Martens, *Précis*, § 20; Klüber, § 1; Lawrence, p. 68.

² The Transvaal Republic, originally independent, impaired its sovereignty when it agreed, in article 4 of the convention of February 27, 1884, to make "no treaty with any other state, other than the Orange Free State, nor with any native tribe east or west of the Republic, without the approval of Great Britain."

does it cease to be a person in international law. Such communities are usually termed protected states, because by reason of their inability to defend themselves they have been placed under a protectorate, constituted either by a voluntary stipulation between themselves and the protecting power, or by an arrangement made without their consent between other powers interested in the disposition of their territory. In cases in which the international existence of protected states ceases entirely they may still enjoy, so far as their internal affairs are concerned, almost entire independence of the controlling state.

When a state ceases to be a person in international law.

6. The normal condition of the family of nations — composed of a group of territorial sovereigns who have inherited a common civilization and are upon the same general plane of moral and political opinion — is one of peace. Therefore the body of rules regulating their relations in time of peace may be called normal international law in contradistinction to the body of rules regulating their relations when they are in the abnormal condition known as a state of war. Normal international law may be called the substantive law of nations by which rights are defined, while abnormal, the procedure through which the substantive law may be lawfully enforced, may be called the adjective law of nations, corresponding in a general way with what is called "the law of nations in time of war." Under normal international law or the law of peace are grouped all the rules relating to formal equality, to non-intervention, and to territorial jurisdiction. The rights and duties of states in time of peace involve a consideration (1) of the nature and attributes of states, sovereign and part sovereign, (2) sovereignty and jurisdiction in relation to persons, (3) sovereignty and jurisdiction in relation to property, (4) diplomatic intercourse, (5) the treaty-making power, (6) and the right of self-preservation. The rights and duties of states in time of war involve a consideration (1) of

International law, normal and abnormal;

substantive and adjective;

law of peace;

law of war;

law of
neutrality.

the forcible means of redress short of actual war, (2) the commencement of war and its immediate consequences, (3) the rights and duties of belligerents during hostilities on land and sea, (4) the limitation, suspension, and conclusion of hostilities, (5) the laws of war as to enemy persons, (6) the laws of war as to enemy property on land, (7) the laws of war as to enemy property at sea, (8) military occupation and administration, (9) and the termination of war. Abnormal international law embraces not only belligerency but neutrality, whose consideration involves (1) the duties of neutral towards belligerent states, (2) the duties of belligerent towards neutral states, (3) legitimate neutral commerce, (4) contraband trade, (5) neutral services, lawful and unlawful, (6) blockade, and (7) the right of visit and capture.

Holy Roman Empire as an international power.

7. The separate nationalities composing the state system of modern Europe, which arose out of the wreck of the Empire of Charles the Great, passed through a long childhood under the protecting wings of an institution that illustrated for centuries the enduring power of a political theory. The chiefs of that comprehensive institution were the Roman emperor and the Roman pontiff, — the one standing at its head in its temporal character as an empire, the other standing at its head in its spiritual character as a church. The Roman Empire and the Roman Catholic Church were, according to medieval theory, two aspects of a single Christian monarchy whose sway was supposed to be universal. The highest aspiration of the pope in his struggles with the emperor was so to establish his supremacy over all princes, including the emperor himself,¹ as to enable him to offer to

Its sway supposed to be universal.

¹ Whether the supreme temporal ruler, who was admitted to his high office through consecration at the hands of the spiritual chief of Christendom, was in the last resort subordinate to the latter as the lesser to the greater light, or whether their dignities were coördinate, and coequal, were the questions over which was fought the great battle between pope and emperor in the days of the world's wonder, Frederick II. The contention Frederick left unsettled was continued in the next age by two famous disputants. St. Thomas of Aquinas,

Europe the arbitrating power it demanded. That judicial supremacy, which the pope claimed not only over the emperor but over all other Christian princes, taking its color from the dominant political ideas of the age, naturally assumed a feudal shape. The theory was that all Christian princes stood to the Roman pontiff as great vassals to a supreme lord. The pope claimed the right to enforce the duties due to him from his feudal subordinates through an ascending scale of penalties that culminated at last in the absolution of the subject from the bonds of allegiance, and in the deposition of the sovereign himself. Here existed in theory, and to a certain extent in fact, an international system governed by law proper or positive law, emanating from a common superior and enforceable by him through physical means.¹ No matter to what extent the Holy Roman Empire may have failed as an international power, whether arbitrating on its spiritual side through the pope and the canon law, or on its temporal side through the emperor and the Imperial law,² the fact remains that for centuries it was the one bond of cohesion holding Europe together under the spell of a theory that assumed to provide a complete system of international justice and a supreme tribunal adequate for the settlement of all controversies which could possibly arise between Christian nations. Ever since that imposing fabric was wrecked by the earthquake known as the Reformation, the family of nations has been dreaming of a substitute for the Grotian system of law by analogy, — a system without any common superior who

The one bond of cohesion for centuries.

in his treatise, "Of the Government of Princes," defended the supremacy of the papacy on the one hand, while Dante, in his *De Monarchia*, maintained the independence of the empire on the other.

¹ Such were the claims of the papal power and such its resources when King John of England found it expedient to kneel at the feet of Innocent III.

² The advocates of the "Imperator Pacificus" depicted him not only as a peacemaker but as the very embodiment of legality. "Imperator est Animata lex in terris." Von Raumer, v. 81, quoting from a letter of the bishops of Salzburg and Regensburg to Pope Gregory IX. Cf. Bryce, *Holy Roman Empire*, p. 239, note 2.

The dream
of a substi-
tute for the
Grotian
system.

can either enact law or enforce it. The aim of the project of the Abbé St. Pierre, brought forward in 1713 and matured in 1729, was to perpetuate the settlement embodied in the treaties of Utrecht through an alliance or league of European states, which should renounce the right of war, and submit all differences to the arbitration of a diet representing twenty votes, three fourths of which was to be final.¹ In 1786-1789 followed the scheme of Jeremy Bentham²; and in 1795 Immanuel Kant published his essay "touching perpetual peace,"³ in which he maintained that international law should rest upon a confederation of free states which should guarantee untrammelled intercommunication through the establishment of a world citizenship, under the direction of a congress to be called and dissolved at the pleasure of the members of the confederation. If that ideal is ever attained, international law will cease to be law by analogy by being transmuted into the positive law of a federal government embracing the states of the world. The great movement now in hopeful progress, which has as its center the organization existing at The Hague, has that august end in view. Whenever by a system of treaties the leading states of the world agree to submit certain classes of rights to compulsory arbitration and adjudication by a court whose judgments can be enforced by physical means, then, to that extent, the international rules regulating such classes of rights will be transmuted into positive law as to the states interested.

The hope of
transmut-
ing interna-
tional law
into posi-
tive law.

¹ Cf. Wheaton, *History of Law of Nations*, pt. ii.

² *Works* (Bowring ed.), pt. viii., pp. 537-554.

³ For his *Zum Ewigen Frieden*, see *Works*, v. 411-466.

CHAPTER IX

INTERNATIONAL RULES TO PREVENT CONFLICT OF LAWS

1. The system of international law founded by Grotius was intended to regulate the intercourse of a group of territorial sovereigns that recognized, as the basis of their union, the maxim that territory and jurisdiction are coextensive. The inevitable sequitur was an exclusive sovereign and legislative authority in each separate territory; and to this day it is a principle recognized by all authorities that each individual state may, by virtue of its sovereign power, shut out foreign laws from its territory altogether. As Foelix¹ has expressed it: "Every state possesses the power of regulating the conditions on which the real and personal property, within its territory, may be held or transmitted; and of determining the state and capacity of all persons therein, as well as the validity of the contracts and all other acts which arise there, and the rights and obligations which result from them; and, finally, of prescribing the conditions on which suits at law may be commenced and carried on within its territory." From that general right of control results the exclusive power of every state to fix the personal and civil status of its citizens and the status and condition of all real and personal property situated within its limits, whether belonging to citizens or aliens. Upon that basis rest two of the three maxims of Huber:² first, that the laws of every empire have force only within the limits of its own government, and bind all who are subjects thereof, but not beyond them; second,

Every state may exclude foreign laws from its territory.

Foelix's statement.

Two of the three maxims of Huber.

¹ *Droit Int. Privé*, § 9.

² *De Conflictu Legum*, lib. i., tit. 3, § 2, p. 538.

that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. The independence of each state within its own borders guarantees to it the right to regulate every set of circumstances which call for decision exclusively by its own law, without contravening any principle of international law. If, in the exercise of that undoubted right, each member of the family of nations had in virtue of its sovereignty insisted that its courts should apply the *lex fori*, the natural law for the courts of each state to apply, to all jural relations coming before them, there could have been no such thing as a body of international rules or tacit understandings for the prevention of conflict of laws. No such conflicts could have occurred.

A strict application of the *lex fori* would prevent all conflicts of law.

Comity, a body of rules to prevent inconveniences and injustices.

2. The body of rules for the prevention of conflict of laws are the product of mutual concessions from one state to another, made, upon the basis of comity, in order to prevent inconveniences and injustices arising out of intercommunication. If no such concessions had been made, the intercourse of nations would have been continually vexed with inconveniences and injustices arising out of conditions in which a right duly acquired under the laws of one country could be annulled by contrary laws prevailing in another. In order to modify the evils that would have resulted from a strict enforcement of the *lex loci*, the family of nations has fallen back upon the third axiom of Huber,¹ that the rulers of every empire from comity admit that the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments, or of their citizens. That expedient has prospered through the willingness upon the part of states to modify their exclusive rights of sovereignty in order to prevent "gross inconveniences and

Third axiom of Huber.

¹ *De conflictu legum*, lib. i., tit. 3, § 2, p. 538.

injustice to litigants, whether natives or foreigners.”¹ Thus there has been growing up among civilized states, since the middle of the seventeenth century, a body of rules touching the purely private relations of individuals, whose aim is to secure the recognition and enforcement in the courts of every state of any right which has been duly acquired under the laws of another.² It has not been found convenient, however, to relax the exclusive sovereign right of every state to determine the status and disposition of immovable property. All rights in immovables are, as a general rule, regulated by the *lex situs*. This growing system of mutual concessions has therefore been limited to the regulation of rights in movables upon the basic principle that the personal status and jural capacity of a person is to be determined by the law of his domicile. In that way this branch of law has been mainly occupied with the application of the *lex domicilii* to questions of marriage, divorce, succession, wills, citizenship, minority, legitimacy, lunacy, guardianship, and administrations, foreign judgments and contracts, bankruptcy, and the like. By Savigny³ and many other foreign jurists it has been held that a person’s status, subject to certain exceptions, depends entirely upon the law of his domicile, or, as Lord Westbury expressed it in *Udny v. Udny*,⁴ a person’s civil status ought to be “governed universally by one single principle, namely, that of domicile, which is the criterion established

Aim of existing system.

Influence of the law of domicile.

Savigny

and Lord Westbury.

¹ Dicey, *Conflict of Laws*, p. 10.

² Savigny, writing in 1849, said in his preface: “It may be said that this branch of science has already become a common property of civilized nations, not through possession already gained of fixed, universally acknowledged principles, but through a community in scientific inquiries which reaches after such possession. A vivid picture of this unripe but hopeful condition is furnished by the excellent work of Story, which is also in a high degree useful to every investigator as a rich collection of material.” *A Treatise on the Conflict of Laws*, forming the eighth volume of his *System des heutigen Römischen Rechts*. See W. Guthrie’s trans., 2d ed., Edinburgh, 1880.

³ *Conflict of Laws*, § 362, Guthrie’s trans., 2d ed., p. 148.

⁴ (C.A.) 1 L.R. 1 Sc. App. 441, 457. See also *Sottomayor v. De Barros*, 3 P.D. (C.A.) 1.

General
rules as to
law of
domicile.

by law for the purpose of determining civil status." Hence the general and convenient rules, subject to certain exceptions, that the assignment of movables, wherever situated, in accordance with the law of the owner's domicile is valid; that a person's capacity to enter into a contract is governed by the law of his domicile at the time of its making; that a marriage is valid when each of the parties has, according to the law of his or her respective domicile, the capacity to enter into that relation; that a will of movables is to be interpreted with reference to the law of the testator's domicile at the time when it was made, and that the distributable residue of the movables of a deceased person is governed by the law of his domicile at the time of his death. The fact should never be for a moment lost sight of that all such principles are simply exceptions to the general rule of the *lex fori*, which it has become inconvenient to apply, as civilization and commerce have advanced, to all transactions, whether completed wholly within the territory or partly outside of it, and to acts of all persons, whether permanently settled in the country or merely passing through it. It is of course purely a voluntary act on the part of any state when, in obedience to comity, it gives effect to a foreign law.

Exceptions
to the rule
of the *lex*
fori.

Judicial
evolution
of the rules
in question.

3. Through a slow and troubled process of judicial evolution have come into being the rules or understandings now enforced for the prevention of conflict of laws. Scanty success has attended the many efforts made to find in the authorities on Roman law general principles for the application of the laws of different countries, for the reason that for the purposes of trade no principles of law were necessary but those the Roman jurists indicated by the name *jus gentium*. That law could never come into conflict with Roman civil law because it was a law, "*Quod apud omnes gentes peraeque custoditur.*" Or probably it may be said that the *jus gentium* was created primarily to prevent a conflict of laws, as

Why no
conflict
between
jus gentium
and Roman
civil law.

it was the first law that a Roman praetor could ever apply to men of all nations.¹ Nothing substantial can be drawn from the oft-quoted passage, "*Cunctos populos quos clementiae nostrae imperium regit*,"² which signifies nothing more than the truism that the emperor could only proclaim laws to the peoples whom he ruled. While the subjects of nations with which special treaties had been concluded for mutual legal recognition were held upon the whole, as were almost all foreigners with whom Rome had a peaceable commercial intercourse,³ to be of full legal capacity for all the purposes of trade, such concessions did not put the foreigner on equal terms with the Roman citizen as regarded private rights and privileges. Although the evidence is not direct, it may be safely assumed that when questions arose as to the legal status and capacity of foreigners to act they were determined by the law of the country to which the foreigner belonged. If it were lawful for a foreigner to bring slaves to Rome with him, or to take them away from Rome, slavery would be treated by the courts precisely like property in other movable goods. In the days of the Empire, when Roman citizens lived in all quarters of its dominions and observed their own law without regarding the place where they dwelt, it is very clear that the private law of property and rights was treated by Romans and strangers as a special part of the law of status which followed a Roman wherever he went.⁴ The legal position of all became the same of course when, at a later time, Caracalla

Special treaties did not put foreigners on equal terms with Roman citizens.

How status and capacity of foreigners were determined.

The law of status that followed a Roman wherever he went.

¹ See above, pp. 33 sq.   ² First title of the Codex, *de Summa Trinitate*.

³ See L. 5, § 2, D. de captivis, 49, 15. "In pace quoque postliminium datum est; nam si cum gente aliqua neque amicitiam, neque hospitium neque foedus amicitiae causa factum habemus, hi hostis quidem non sunt; quod autem ex nostro ad eos pervenit, illorum fit . . . idemque est, si ab illis ad nos aliquid perveniat. . . ." Cf. Foelix, i., p. 8.

⁴ Wächter (i. § 242), *Ueber die Collision der Privatrechtsgesetze im Archiv für die civilistische Praxis*, xxiv., xxv. According to Savigny the right of Roman citizenship possessed by every citizen of a *municipium*, in addition to his own native rights of citizenship, had nothing to do with determining his personal rights, but that in determining these no regard was paid except to the law of his own home.

gave rights of Roman citizenship to all the free inhabitants of the Empire.¹

Personal
stage in the
develop-
ment of
law

as illus-
trated by
govern-
ments es-
tablished
by bar-
barians.

Concession
of Franks
to con-
quered
races.

Roman law
as the per-
sonal law of
Romani.

4. The personal stage in the development of law — when it was not administered as a system within a given territory, but applied to members of tribes or races or religious cults in pursuance of the personal law of the defendant — is vividly illustrated by the governments established by the barbarians upon the wreck of the Roman Empire. As in the kingdoms founded by the Goths and Burgundians the intruding Teutons were only a small part of a population, the bulk of which was Gallo-Roman, it was natural that the Romani should continue to live their own law. As the Salian Franks spread over Gaul, while retaining for themselves their own *Lex Salica*, they conceded to the conquered races the right they claimed for themselves. After the founding of the novel Roman Empire of Charles the Great, Roman law ceased to be the territorial law of any part of the lands that had become subject to the so-called Roman emperor. Even in Rome it sank to the level of a personal or racial law, while in Northern Italy there were many Swabians who lived Alamannic, and Franks who lived Salic or Ripuarian law, besides the Lombards.² Thus Roman law became in Rome itself only the personal law of the Romani.³ The churches, except some of the royal foundation, also “lived Roman law.”⁴ It was long before the old question *Qua lege vivis?* lost its importance. This system of personal laws rested on the theory that each

¹ Gellius, *N. A.* iv., c. 4, records the fact that when the right of Roman citizenship was given to the Latin towns, they lost their own marriage laws. As to the conflict of that fact with Savigny's opinion, cited above (viii. § 357, Guthrie, p. 120), see Bar, *International Law*, p. 12, note 6. See also pp. 9-77.

² Brunner, *Deutsche Rechtsgeschichte*, i. 260.

³ In 1038 Conrad II. ordained that Roman law should be once more the territorial law of the city of Rome. M. G. Leges, ii. 40; Conrat, *Geschichte de Quellen des Römischen Rechts*, i. 62.

⁴ In Italy, though not in Frankland, the rule that the individual cleric lives Roman law seems to have been gradually adopted. Brunner, *op. cit.*, i. 269; Löning, *Geschichte des deutschen Kirchenrechts*, ii. 284.

different race within the bounds of the Empire was a caste or status by itself. As a rule every man lived by the law of the nation to which he belonged by descent, and the law of his father's nation of course ruled. The wife lived by the law of her husband's nation; marriage was celebrated under the law of the husband's nation; during the marriage the wife shared the husband's status; not until she became a widow did she recover the law under which she was born. From the international or intertribal rules of the Frankish realm recovered in recent years we are now able to understand how an adjustment was made of "a conflict of laws," inevitable under such a system of personal laws.¹ By such rules the amount of the wergild was fixed by the law of the slain, and not by that of the slayer; the law of the grantor prescribed the ceremonies with which land must be conveyed; legitimate children took their father's, bastards the mother's, law.

A man lived by the law of his nation.

How adjustment was made of "a conflict of laws."

Carolingian capitularies or statutes which enact territorial laws mark an important stage in the general process of transition from personal or tribal to territorial organization. Out of that process, which transformed *Rex Francorum* into *Rex Franciæ*, has arisen the state system of modern Europe in which the idea of territorial sovereignty and territorial laws is the basis of all international relations. Under the new conditions thus brought about, — in which law, instead of being applied on a personal basis to members of tribes or races, was administered as a system within a given territory, — it became necessary to construct a new body of rules or understandings for the prevention of conflict of laws. The jurists who assumed the task of constructing the new system were forced to recognize the fact that "From the conception of territorial sovereignty, which is now so firmly

Transition from personal to territorial organization.

¹ Brunner, *op. cit.*, i. 261 ff.; Pollock and Maitland, *History of English Law*, i. 13 *sq.*

Result of the
conception
of terri-
torial sov-
ereignty.

established, there follows the right of the legislator to lay down for the courts of his country instructions for the disposal of each and every legal question that may form the subject of an action before them. The judge must follow the express directions of the legislature of his country in questions that have to do with international intercourse, just as much as those that are concerned with questions of native law alone. . . . The difficulty, however, which all recognize consists simply in this, — that it is quite exceptional to find express instructions of the legislature; and for want of these the judge must, by interpreting the statute law, seek out the will of the legislator, and decide in accordance with it.”¹ In other words, while the legislatures of the several territorial sovereigns composing the family of nations possess the right to determine, by express enactment, all the conditions under which foreign laws may be administered within their respective limits, they have wisely committed, excepting only criminal law, the delicate and difficult task to the judges who have, through judicial legislation, built up the set of understandings now existing under the name of comity. Wächter, in his important treatise quoted already, which has so greatly advanced the study of the subject, assumes that the judge who passes upon the application of foreign law, in default of express instructions as to the legal relations that arise with other countries, must be governed by the spirit and meaning of the statute and not by its words. Thus many authors, such as Massé, for instance, without the statement of a general principle, assert that the justice and equity of each particular case must determine whether foreign laws are to be applied or not.² Out of the tendency of the judicial rules thus announced to approach a common

Comity the
product of
judicial
legislation.

¹ Bar, *Private International Law*, p. 61 (Gillespie's trans.).

² Massé, *Le Droit Commercial dans ses Rapports avec le Droit des Gens et le Droit Civil*, 3^e éd., Paris, 1874.

standard, a process which has been greatly advanced by the influence of a growing body of theory, has arisen a set of understandings that certainly possess a certain binding authority. As Dicey¹ has expressed it: "The application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners."

Dicey's statement.

5. When a glance is taken at the origin and growth of the literature of the subject, we find its beginnings in the competing claims of the *statuta* of different Italian cities, the discussions of the commentators proceeding directly on the proposition that a statute is binding only upon the subjects of a state. Discussions on the question whether a statute is binding on the clergy are set alongside of the question as to the conflict of the laws of the different states.² Before the close of the Middle Ages the theory, known at a later time as the theory of personal, real, and mixed statutes, had begun to prevail. The example set by Bartolus³ in his *Commentarii in Codicem* in the fourteenth century was followed by a series of writers such as Halbritter, who wrote *De Statutis*, in 1545. From the former we learn that at last it came to be recognized that strangers might subject themselves to the laws of a foreign country, either by concluding contracts or committing delicts. John Voet, in his *Commentary on the Pandects*,⁴ written in 1698, held that in strict law no appeal could be made in a foreign court to the *lex domicilii* as deter-

Origin and growth of the literature of the subject.

Personal, real, and mixed statutes.

Bartolus.

Halbritter.

John Voet.

¹ *Conflict of Laws*, p. 10.

² Cf. Albericus de Rosate, de stat., lib. ii., q. 2, §§ 7, 10, 15; Petr. Ravenn., de stat., sect. 2, § 51 sq.

³ He was a professor of law in the University of Pisa; was born in 1314, and died in 1357. He wrote commentaries on the three parts of the Digest and Code, — *Concilia*, *Tractatus*, and *Questiones*.

⁴ Especially lib. i., tit. 4, pres. 6, de stat.

mining the status and capacity of a person; that only when special exceptions had been made by the free permission of the authority of the state could the judge, who could only carry out its will, apply any but the law of his own country. As such special exceptions, sanctioned by long practice, he treated the rules that movables are regularly judged by the law of the domicile of the person that owns them, and the external forms of a legal transaction by the laws of the place where it is entered into. As late as 1823 J. Henry published his *Treatise on the Difference between Personal and Real Statutes*; and in 1845 appeared a *Traité des Statuts, lois personnelles et réelles, et du droit international privé*, by Chassat. In 1653 a definite name was first given to such discussions by Rodenburg, who prefixed to his *Tractatus de jure conjugum* his *Tractatus de jure quod oritur ex statutorum vel consuetudinum discrepantium conflictu*, in which he rested the theory of *statuta personalia, realia*, and *mixta* upon the proposition that the legislator cannot lay down rules for things that are situated in a foreign country, or for persons who are domiciled there.¹ According to his view, personal statutes confer on the person a quality that adheres to him; otherwise a man might be of full age in one place, and a minor in another. In 1661 followed Paul Voet's *De statutis eorumque concursu*, in which, after assuming the division of *statuta* into real, personal, and mixed to be fundamental, he deduces from the independence of the different territories the conclusion that a personal statute, strictly construed, will not affect subjects of a state who are temporarily absent in another, admitting at the same time that no legislator can lay down rules for foreigners who happen to be for a time in his dominions, as regards their capacity or incapacity. In 1686 appeared Huber's famous

¹ Tit. i., cap. 3, no. 1. He admits, however, that it is possible to lay down such rules indirectly (*loc. cit.*, no. 5).

chapter *De conflictu legum*,¹ in which he brings to the front, even more emphatically than Voet, the independence of the different territories, by maintaining at the outset that the laws of a state have no force except within that state where they are good for all persons who are found within it. The strictness of that axiom is, he says, modified only by the friendly intercourse that exists among the different states, and by the *comitas* they observe. Thus, as the application of foreign laws is permitted, so far as it is not repugnant to the supremacy of the sovereign power of a state, the laws of the place where any legal transaction is entered into should determine its validity, just as the qualities of persons, which are stamped upon them in the same way, should be determined by the law of their domicile, while all the legal relations of immovables should be settled by the laws of the place where the thing is. In obedience with that rule, he applies the *lex rei sitae*, not only to testate and intestate succession in movables, but even to contracts that concern movables.

In 1688 appeared the *De collisione legum*² of Hertius, in which he attempts to establish the validity of the *lex domicilii*, in relation to the status and capacity of persons, upon the ground that the sway of a state over foreigners is confined to the transactions they enter into upon its soil, or to the immovables they possess there. In 1715 appeared Meiern's

Hertius.

De statutorum conflictu eorumque apud exteros valore; in 1740, Alef's *De diversorum statutorum concursu eorumque conflictu*

Meiern.

dissertatio; in 1792, Ham's *De statutorum collisione et prae-*

Alef.

ferentia; in 1828, Livermore's *On the Contrariety of Laws*;

Ham.

in 1831, Brinkmann's *Von dem Widerspruche ausländischer und einheimischer Gesetze*; in 1834, Story's *Conflict of Laws*;

Brinkmann.

in 1841, Schäffner's *Die Entwicklung des Internationalen*

Schäffner.

¹ In his *Praelectiones juris Romani*, pt. ii., as appendix to tit. 3, lib. i., *de legibus*. Francquerae, 1699.

² In the *Opuscula*, i., pp. 118-154.

- Wächter. *Privatrechts*; in 1841 and 1842, Wächter's *Über die Collision der Privatrechtsgesetze verschiedener staaten*; ¹ in 1843, Foelix's *Traité du droit international privé, ou du conflit des lois en matière de droit privé*; ² in 1847, J. Hosack's *Conflict of Laws*; in 1851, Pfeiffer's *Das Princip des Internationalen Privatrechts*; in 1858, Westlake's *Private International Law, or the Conflict of Laws*; in 1861, Sir Robert Phillimore's volume *On Private International Law, or Comity*; in 1862, von Bar's *Das Internationale Privat- und Strafrecht*; ³ in 1869, Fiore's *Diritto internazionale privato, o principii per risolvere i conflitti tra legislazioni diverse in materia di diritto civile e commerciale*; in 1872, Wharton's *Conflict of Laws*; in 1874, Haus's *Le droit privé qui régit les étrangers en Belgique* and Lomonaco's *Trattato di diritto civile internazionale*; in 1876, Brocher's *Nouveau traité du droit internationale privé*; in 1878, Foote's *Private International Jurisprudence*, Asser's *Schets van het internationaal Privaatrecht*, and von Püttlingen's *Handbuch des in Oesterreich-Ungarn geltenden internationalen Privatrechts*; in 1880, Laurent's first volume of the *Droit civil international* and Fiore's *Droit pénal international* (translated by C. Antoine); in 1896, Dicey's *Digest of the Law of England with reference to the Conflict of Laws*; and in 1901, Minor's *Conflict of Laws, or Private International Law*.

Two groups of basic principles.

6. The vital principles of the immature yet growing international system, if system it may be called, for the prevention of conflict of laws may be arranged in two groups, the first of which adheres closely to the original idea of an exclusive sovereign and legislative authority in each territory. In the first group must be placed the five instances wherein it is

¹ See *Archiv für civ. Praxis*, Bd. xxiv., p. 230; xxv., p. 1.

² 4th ed., Paris, 1866, *Revue et augmentée par Demangeat*. This treatise is a republication of a series of articles "*du conflit des lois de différentes nations, ou du droit international*" begun by Foelix in 1840.

³ The edition of 1889 is restricted to *Privatrecht*. *Private International Law*, trans. by G. R. Gillespie, 2d ed., 1892.

generally considered that the municipal law of the state in which the question is raised (*lex fori*) forbids the enforcement of a foreign law. (1) Where the enforcement of the foreign law will contravene the express statute law or an established policy of the forum, or is injurious to its interests;¹ (2) where the enforcement of such foreign law would involve injustice and injury to the people of the forum;² (3) where such enforcement would contravene the canons of morality established by civilized society;³ (4) where the foreign law is penal in its nature;⁴ (5) where the question relates to land or immovable property of any kind.⁵ Since immovable property is fixed forever in the state where it lies, and since no other state can have any jurisdiction over it, it follows necessarily that no right, title, or interest can be finally acquired therein unless assented to by the courts of that state, in accordance with the *lex loci rei sitae* or *lex situs*. As the policy of each state in reference to the transfer of immovable property within its limits is ranked among the most important of all its policies, no outside interference with it can be tolerated. Not until all the cases covered by the principles embraced in the first group have been excluded is the field clear for the statement of the principles embraced in the second. After such exclusion has been made, the rules for the prevention of conflict of laws may be said to relate to all transactions containing a foreign element. If any given transaction arises wholly within a single state, all the parties

Five instances in which a foreign law cannot be enforced.

Immovable property.

Transactions with a foreign element.

¹ *Smith v. Union Bank*, 5 Peters 518, 527; *Green v. Van Buskirk*, 7 Wall. 139; *May v. Bank*, 122 Ill. 551; *Frank v. Babbitt*, 155 Mass. 112, 115.

² *Green v. Van Buskirk*, 5 Wall. 307, 312; *Pennoyer v. Neff*, 95 U.S. 714, 723; *Cole v. Cunningham*, 133 U.S. 107, 126; *Barnett v. Kinney*, 147 U.S. 476; *Gilman v. Ketchum*, 84 Wis. 60.

³ *Woodworth v. Spring*, 4 Allen (Mass.) 321; *Bank v. Williams*, 46 Miss. 618; *Hilton v. Guyot*, 159 U.S. 113.

⁴ *The Antelope*, 10 Wheat. 66, 123; *Huntington v. Attrill*, 146 U.S. 657, 666; *Com. v. Green*, 17 Mass. 515, 539-540; *Succession of Hernandez*, 46 La. Ann. 962.

⁵ *United States v. Crosby*, 7 Cranch 115; *Clark v. Graham*, 6 Wheat. 577; *Ross v. Ross*, 129 Mass. 243, 245.

interested having been, and continuing to be, domiciled and actually present therein, the question being raised there also, no foreign element exists to cause any interference with the regular enforcement of the law of that state in the domestic tribunals. In such a case there can be no question as to the state having the jurisdiction to apply the law to the facts; nor can there be any question as to the proper law to be applied.¹ No doubt can arise in such a case either as to the appropriate *forum* or as to the appropriate *lex*. But if one or more of the parties live in another state, or the transaction or some part of it has arisen elsewhere, a foreign element is at once imported into the case, and it may be necessary to inquire whether the court is to be governed in its decision by the domestic law, by the law of the place where the parties or some of them are domiciled, by the law of the place where the transaction or part of it arose, or by the law of the place where property affected thereby may be situated. As the completed transaction may be made up of all these various elements, its ultimate validity will in general depend upon the validity of each of its constituent parts when tested by the proper law. If, when so tested, each element is valid, then the transaction as a whole will be valid; but if one or more of the essential steps be invalid, when measured by its proper law, neither can the transaction as a whole be in general sustained. Every element in every transaction known to the law has a *situs* somewhere, and the law of that *situs* will regulate and control the legal effect of that element. Hence, in order to arrive at a correct solution of the law which is to govern a particular transaction, that transaction must be resolved into all its essential

Applica-
tion of law
(*Anwend-
ung der
Gesetze*).

How the
validity of
of a trans-
action is to
be tested.

Every ele-
ment con-
trolled by
the law of
its *situs*.

¹ As to the phrase "Application of Law" ("*Anwendung der Gesetze*"), involving the question of the choice of the law to be applied, see the treatise of Oerstadt (1822), "*Über die Anwendung fremder Gesetze*" (*Eunomia*, i., pp. 1-105); Struve's (1834) "*Über das positive Rechtsgesetz in seiner Beziehung auf räumliche Verhältnisse und über die Anwendung der Gesetze verschiedener Oerter*"; and also certain incidental expressions occurring in Savigny's *System*, viii. 15, 32, 109.

parts, and to each of these parts the law of its own situs must be applied. The elements of a given transaction may be active, dependent on the will of the party himself; or they may be passive, arising by act of the law. If a party has once performed the particular act at the place selected, the effect of the act must in general be determined by the law of the place where it is done. This is expressed by the maxim, *locus regit actum*. The party should not be permitted to select one place for the doing of the act in question and then to select the law of a different place to govern that act, for that would be to subordinate the sovereignty of the first state to the will of the individual. Where the elements of the transaction are passive, that is, where they arise by the act of the law, — as a capacity of a party to do an act or receive a benefit, taxation of property, the succession to a decedent's property, adjudications of insolvency or bankruptcy, marital rights, and the like, — such elements must also have a situs somewhere. If the law acts upon the person (and it must act either upon the person or upon property), the act of the law will generally have the same situs as the person, because, if the person be not actually or constructively present within its jurisdiction, the act of the law is nugatory. If the law acts upon property, the situs of the act of the law follows the situs of the property; in other words, the property must have its situs, actually or in contemplation of law, within the jurisdiction of the law purporting to act upon it.¹ Such are the basic principles by which the situs of every element in a transaction, having a foreign element, is ascertained. When the situs of the element is ascertained, the law of that situs will regulate and control the legal effect of that element.² In

Active
elements.

Passive
elements.

How the
situs of an
element is
ascertained.

¹ This is well put by Minor, *Conflict of Laws*, an admirable work, § 17.

² Modern legislation and court practice, as Savigny has well said, aim not to keep up local sovereignty and jurisdiction by a strict enforcement of the *lex fori*, but to decide all jural relations without respect to territorial limits, according to the inner nature and needs of each one of them. See Guthrie's trans., pp. 144-145.

Possible
fora.

Questions
upon which
courts must
pass.

Nomen-
clature.

Comity
defined.

that way is ascertained the proper law to govern the case. As a general rule it is far more difficult to ascertain the proper law, the appropriate *lex* applicable to the particular case, than it is to ascertain what court has jurisdiction to try it *ratione territorii*.¹ Courts of the country in which the defendant happens to be, or of the country in which the plaintiff, or defendant, is domiciled, or to which he owes allegiance, or of the country in which the object in dispute is situated, or of the country in which the juristic act in question (such as a marriage, or a sale, or the making of a will) took place, or of the country in which the wrongful act in question was committed, or of the country in which a contract was to bear its fruits, or that in which the plaintiff chooses to commence his action, are all courts in which proceedings may possibly be taken. Thus the courts of each country are called upon, from time to time, to decide not only as to their own competence, but as to the competence of the courts of other states, especially when it is necessary to determine whether or no their decrees can be recognized under the technical description of "foreign judgments."

7. As the true nature of the rules or understandings for the prevention of conflict of laws has now been ascertained from the history of their development, it should not be difficult to form a phrase descriptive of them. Their true nature was never more clearly defined than in the case of *Hilton v. Guyot*,² in which it was said that "Comity is neither matter of absolute obligation nor of mere courtesy and good will. It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having

¹ In defending that phrase, Holland says it "seems better adapted than its older equivalent 'jurisdiction *ratione personae*,' to distinguish the question stated in the text from questions as to 'jurisdiction *ratione materiae*,' '*sächliche Zuständigkeit*,' i.e. as to the proper court, within a given territory, for the trial of a particular class of actions." *Jurisprudence*, p. 398, note 1.

² 159 U.S. 113. Opinion by Mr. Justice Gray.

due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of the laws.”¹ The “recognition” thus allowed by one nation to another is an assent to such rules expressed through that organ of sovereignty known as the judicial power. No state can assent to an international rule in a method more orthodox. In the case of *Queen v. Keyn*,² wherein the manner in which a nation should assent to an international rule was a vital issue, it was held that the assent of a nation to such a rule, as was in question in that case, must be manifested by some formal act performed by it in its sovereign capacity, — such, for instance, in the case of Great Britain, as an act of Parliament or the judgment of a competent tribunal. As the assent of states has thus been given to the rules in question, they are certainly international rules. The laws of the state actually enforced within the territory of another are national laws; the rules by virtue of which they are enforced are international rules. In describing such rules, Sir Henry Maine has referred to them as “prescribing the conditions on which one community will recognize and apply a portion of the jurisdiction of another.”³ If we add the manifest purpose for which such rules were made, the phrase completes itself, — “International Rules for the Prevention of a Conflict of Laws.” When the shorter phrase, “Conflict of Laws,” is used simply as an abbreviation, it is unobjectionable. But as this body of rules is intended only to prevent conflict in matters of purely individual right, it should be considered as subsidiary to that more august body of rules known as International Law proper, which is strictly confined to the relation of states with states. Therefore the phrases, “International Law” and “Conflict of Laws,” the latter being

States assent to the rules in question, through the judicial power.

As international rules.

for the prevention of “Conflict of Laws.”

¹ In the language of Huber, “*Rectores imperiorum id comiter agunt ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim.*” *Prael-juris Romani, pars ii ad Pandect*, lib. i., tit. 3.

² L.R., 2 Exchequer Division, pp. 63-239.   ³ *International Law*, p. 17.

"Inter-
national
Law" and
"Conflict of
Laws."

used as an abbreviation, are, as descriptions of the two sets of rules in question, preferable to all others. As early as 1844 Chancellor Kent, in the first volume of his *Commentaries*, said that "a recent French writer (M. Victor Faucher) divides the law of nations into two branches: (1) *public* international law, which regulates the political relation of nations to nations; and (2) *private* international law, which, though based upon the first, regulates the reciprocal and personal relations of the inhabitants of different states."¹ At the conclusion of this volume the author desires to confess that he heretofore acted unwisely in adopting these phrases, derived by Kent from Faucher, subject as they are to many serious objections.²

¹ *Commentaries*, 2, note a, ed. of 1851.

² Taylor, *International Public Law*, p. 155.

APPENDIX

THE EPOCH-MAKING TRACT OF PELATIAH WEBSTER, IN WHICH IS EMBODIED THE FIRST DRAFT OF THE EXISTING CONSTITUTION OF THE UNITED STATES:

A D I S S E R T A T I O N

ON THE

P O L I T I C A L U N I O N

A N D

C O N S T I T U T I O N

O F T H E

T H I R T E E N U N I T E D S T A T E S

O F

N O R T H A M E R I C A ,

*which is necessary to their Preservation and Happiness;
humbly offered to the Public.*

(First published in Philadelphia, 1783.)

I. The supreme authority of any State must have power enough to effect the ends of its appointment, otherwise these ends cannot be answered, and effectually secured; at best they are precarious. — But at the same time,

II. The supreme authority ought to be so limited and checked, if possible, as to prevent the abuse of power, or the exercise of powers that are not necessary to the ends of its appointment, but hurtful and oppressive to the subject; but to limit a supreme authority so far as to diminish its dignity, or lessen its power of doing good, would be to destroy or at least to corrupt it, and render it ineffectual to its ends.

III. A number of sovereign States uniting into one Com-

monwealth, and appointing a supreme power to manage the affairs of the Union, do necessarily and unavoidably part with and transfer over to such supreme power, so much of their own sovereignty as is necessary to render the ends of the union effectual, otherwise their confederation will be an union without bands of union, like a cask without hoops, that may and probably will fall to pieces, as soon as it is put to any exercise which requires strength.

In like manner, every member of civil society parts with many of his natural rights, that he may enjoy the rest in greater security under the protection of society.

The Union of the Thirteen States of America is of mighty consequence to the security, sovereignty, and even liberty of each of them, and of all the individuals who compose them; united under a natural, well adjusted, and effectual Constitution, they are a strong, rich, growing power, with great resources and means of defence, which no foreign power will easily attempt to invade or insult; they may easily command respect.

As their exports are mostly either raw materials or provisions, and their imports mostly finished goods, their trade becomes a capital object with every manufacturing nation of Europe, and all the southern colonies of America; their friendship and trade will of course be courted, and each power in amity with them will contribute to their security.

Their union is of great moment in another respect; they thereby form a superintending power among themselves, that can moderate and terminate disputes that may arise between different States, restrain intestine violence, and prevent any recourse to the dreadful decision of the sword.

I do not mean here to go into a detail of all the advantages of our union; they offer themselves on every view, and are important enough to engage every honest, prudent mind, to secure and establish that union by every possible method, that we may enjoy the full benefit of it, and be rendered happy and safe under the protection it affords.

This union, however important, cannot be supported with-

out a Constitution founded on principles of natural truth, fitness, and utility. If there is one article wrong in such Constitution, it will discover itself in practice, by its baleful operation, and destroy or at least injure the union.

Many nations have been ruined by the errors of their political constitution. Such errors first introduce wrongs and injuries, which soon breed discontents, which gradually work up into mortal hatred and resentments; hence inveterate parties are formed, which of course make the whole community a house divided against itself, which soon falls either a prey to some enemies without, who watch to devour them, or else crumble into their original constituent parts, and lose all respectability, strength, and security.

It is as physically impossible to secure to civil society, good cement of union, duration, and security without a Constitution founded on principles of natural fitness and right, as to raise timbers into a strong, compact building, which have not been framed upon true geometric principles; for if you cut one beam a foot too long or too short, not all the authority and all the force of all the carpenters can ever get it into its place, and make it fit with proper symmetry there.

As the fate then of all governments depends much upon their political constitutions, they become an object of mighty moment to the happiness and well-being of society; and as the framing of such a Constitution requires great knowledge of the rights of men and societies, as well as of the interests, circumstances, and even prejudices of the several parts of the community or commonwealth, for which it is intended; it becomes a very complex subject, and of course requires great steadiness and comprehension of thought, as well as great knowledge of men and things, to do it properly. I shall, however, attempt it with my best abilities, and hope from the candor of the public to escape censure, if I cannot merit praise.

I begin with my first and great principle, viz.: That the Constitution must vest powers in every department sufficient to secure and make effectual the ends of it. The supreme

authority must have the power of making war and peace — of appointing armies and navies — of appointing officers both civil and military — of making contracts — of emitting, coining, and borrowing money — of regulating trade — of making treaties with foreign powers — of establishing post-offices — and in short of doing everything which the well-being of the Commonwealth may require, and which is not compatible to any particular State, all of which require money, and cannot possibly be made effectual without it.

They must therefore of necessity be vested with power of taxation. I know this is a most important and weighty truth, a dreadful engine of oppression, tyranny, and injury, when ill used; yet, from the necessity of the case, it must be admitted.

For to give a supreme authority a power of making contracts, without any power of payment — of appointing officers civil and military, without money to pay them — a power to build ships, without any money to do it with — a power of emitting money, without any power to redeem it — or of borrowing money, without any power to make payment, etc., etc. — such solecisms in government are so nugatory and absurd, that I really think to offer further argument on the subject, would be to insult the understanding of my readers.

To make all these payments dependent on the votes of thirteen popular assemblies, who will undertake to judge of the propriety of every contract and every occasion of money, and grant or withhold supplies, according to their opinion, whilst at the same time the operations of the whole may be stopped by the vote of a single one of them, is absurd; for this renders all supplies so precarious and the public credit so extremely uncertain, as must in its nature render all efforts in war, and all regular administration in peace, utterly impracticable, as well as most pointedly ridiculous. Is there a man to be found who would lend money, or render personal services, or make contracts on such precarious security? Of this we have a proof of fact, the strongest of all proofs, a fatal

experience, the surest tho' severest of all demonstration, which renders all other proof or argument on this subject quite unnecessary.

The present broken state of our finances — public debts and bankruptcies — enormous and ridiculous depreciation of public securities — with the total annihilation of our public credit — prove beyond all contradiction the vanity of all recourse to the federal Assemblies of the States. The recent instance of the duty of 5 per cent on imported goods, struck dead, and the bankruptcies which ensued on the single vote of Rhode Island, affords another proof of what it is certain may be done again in like circumstances.

I have another reason why a power of taxation or of raising money, ought to be vested in the supreme authority of our commonwealth, viz., the monies necessary for the public ought to be raised by a duty imposed on imported goods, not a bare 5 per cent or any other per cent on all imported goods indiscriminately, but a duty much heavier on all articles of luxury or mere ornament, and which are consumed principally by the rich or prodigal part of the community, such as silks of all sorts, muslins, cambricks, lawns, superfine cloths, spirits, wines, etc., etc.

Such an impost would ease the husbandman, the mechanic, and the poor; would have all the practical effects of a sumptuary law; would mend the economy, and increase the industry, of the community; would be collected without the shocking circumstances of collectors and their warrants; and make the quantity of tax paid, always depend on the choice of the person who pays it.

This tax can be laid by the supreme authority much more conveniently than by the particular Assemblies, and would in no case be subject to their repeals or modifications; and of course the public credit would never be dependent on, or liable to bankruptcy by the humors of any particular Assembly. In an Essay on Finance, which I design soon to offer to the public, this subject will be treated more fully. (See my Sixth Essay on Free Trade and Finance, p. 229.)

The delegates which are to form that august body, which are to hold and exercise the supreme authority, ought to be appointed by the States in any manner they please; in which they should not be limited by any restrictions; their own dignity and the weight they will hold in the great public councils, will always depend on the abilities of the persons they appoint to represent them there; and if they are wise enough to choose men of sufficient abilities, and respectable characters, men of sound sense, extensive knowledge, gravity, and integrity, they will reap the honor and advantage of such wisdom.

But if they are fools enough to appoint men of trifling or vile characters, of mean abilities, faulty morals, or despicable ignorance, they must reap the fruits of such folly, and content themselves to have no weight, dignity, or esteem in the public councils; and, what is more to be lamented by the Commonwealth, to do no good there.

I have no objection to the States electing and recalling their delegates as often as they please, but think it hard and very injurious both to them and the Commonwealth that they should be obliged to discontinue them after three years' service, if they find them on that trial to be men of sufficient integrity and abilities; a man of that experience is certainly much more qualified to serve in the place, than a new member of equal good character can be; experience makes perfect in every kind of business — old, experienced statesmen, of tried and approved integrity and abilities, are a great blessing to a State — they acquire great authority and esteem as well as wisdom, and very much contribute to keep the system of government in good and salutary order; and this furnishes the strongest reason why they should be continued in the service, on Plato's great maxim, that "the man best qualified to serve, ought to be appointed."

I am sorry to see a contrary maxim adopted in our American counsels; to make the highest reason that can be given for continuing a man in the public administration, assigned as a constitutional and absolute reason for turning him out, seems to me to be a solecism of a piece with many other

reforms, by which we set out to surprise the world with our wisdom.

If we should adopt this maxim in the common affairs of life, it would be found inconvenient, *e.g.*, if we should make it a part of our Constitution, that a man who has served a three years' apprenticeship to the trade of a tailor or shoemaker, should be obliged to discontinue that business for the three successive years, I am of opinion the country would soon be cleared of good shoemakers and tailors. — Men are no more born statesmen than shoemakers or tailors — Experience is equally necessary to perfection in both.

It seems to me that a man's inducement to qualify himself for a public employment, and make himself master of it, must be much discouraged by this consideration, that let him take whatever pains to qualify himself in the best manner, he must be shortly turned out, and of course it would be of more consequence to him, to turn his attention to some other business, which he might adopt when his present appointment should expire; and by this means the Commonwealth is in danger of losing the zeal, industry, and shining abilities, as well as services, of their most accomplished and valuable men.

I hear that the State of Georgia has improved on this blessed principle, and limited the continuance of their governors to one year; the consequence is, they have already the ghosts of departed governors stalking about in every part of their State, and growing more plenty every year; and as the price of everything is reduced by its plenty, I can suppose governors will soon be very low there.

This doctrine of rotation was first proposed by some sprightly geniuses of brilliant politics, with this cogent reason; that by introducing a rotation in the public offices, we should have a great number of men trained up to public service; but it appears to me that it will be more likely to produce many jacks at all trades, but good at none.

I think that frequent elections are a sufficient security against the continuance of men in public office whose conduct is not approved, and there can be no reason for excluding

those whose conduct is approved, and who are allowed to be better qualified than any men who can be found to supply their places.

Another great object of government, is the apportionment of burdens and benefits; for if a greater quota of burden, or a less quota of benefits than is just and right, be allotted to any State, this ill apportionment will be an everlasting source of uneasiness and discontent. In the first case, the overburdened State will complain; in the last case, all the States, whose quota of benefit is under-rated, will be uneasy; and this is a case of such delicacy, that it cannot be safely trusted to the arbitrary opinion or judgment of any body of men however august.

Some natural principles of confessed equity, and which can be reduced to a certainty, ought, if possible, to be found and adopted; for it is of the highest moment to the Commonwealth, to obviate, and, if possible, wholly to take away, such a fruitful and common source of infinite disputes, as that of apportionment of quotas has ever proved in all States of the earth.

The value of lands may be a good rule; but the ascertainment of that value is impracticable; no assessment can be made which will not be liable to exception and debate — to adopt a good rule in anything which is impracticable, is absurd; for it is physically impossible that anything should be good for practice, which cannot be practised at all; but if the value of lands was capable of certain assessment, yet to adopt that value as a rule of apportionment of quotas, and at the same time to except from valuation large tracts of sundry States of immense value, which have all been defended by the joint arms of the whole Empire, and for the defence of which no additional quota of supply is to be demanded of those States, to whom such lands are secured by such joint efforts of the States, is in its nature unreasonable, and will open a door for great complaint.

It is plain without argument, that such States ought either to make grants to the Commonwealth of such tracts of

defended territory, or sell as much of them as will pay their proper quota of defence, and pay such sums into the public treasury; and this ought to be done, let what rule of quota forever be adopted with respect to the cultivated part of the United States; for no proposition of natural right and justice can be plainer than this, that every part of valuable property which is defended, ought to contribute its quota of supply for that defence.

If then the value of cultivated lands is found to be an impracticable rule of apportionment of quotas, we have to seek for some other, equally just and less exceptionable.

It appears to me, that the number of living souls or human persons of whatever age, sex, or condition, will afford us a rule or measure of apportionment which will forever increase and decrease with the real wealth of the States, and will of course be a perpetual rule, not capable of corruption by any circumstances of future time; which is of vast consideration in forming a constitution which is designed for perpetual duration, and which will in its nature be as just as to the inhabited parts of each State, as that of the value of lands, or any other that has or can be mentioned.

Land takes its value not merely from the goodness of its soil, but from innumerable other relative advantages among which the population of the country may be considered as principal; as lands in a full settled country will always (*caeteris paribus*) bring more than lands in thin settlements. On this principle, when the inhabitants of Russia, Poland, etc., sell real estates, they do not value them as we do, by the number of acres, but by the number of people who live on them.

Where any piece of land has many advantages, many people will crowd there to obtain them; which will create many competitors for the purchase of it; which will of course raise the price. Where there are fewer advantages, there will be fewer competitors, and of course a less price; and these two things will forever be proportionate to each other, and of course the one will always be a sure index of the other.

The only considerable objection I have ever heard to this,

is, that the quality of inhabitants differs in the different States, and it is not reasonable that the black slaves in the southern States should be estimated on a par with the white freemen in the northern States. To discuss this question fairly, I think it will be just to estimate the neat value of the labor of both; and if it shall appear that the labor of the black person produces as much neat wealth to the southern State, as the labor of the white person does to the northern State, I think it will follow plainly, that they are equally useful inhabitants in point of wealth; and therefore in the case before us, should be estimated alike.

And if the amazing profits which the southern planters boast of receiving from the labor of their slaves on their plantations, are real, the southern people have greatly the advantage in this kind of estimation, and as this objection comes principally from the southward, I should suppose that the gentlemen from that part would blush to urge it any farther.

That the supreme authority should be vested with powers to terminate and finally decide controversies arising between different States, I take it, will be universally admitted, but I humbly apprehend that an appeal from the first instance of trial ought to be admitted in causes of great moment, on the same reasons that such appeals are admitted in all the States of Europe. It is well known to all men versed in courts, that the first hearing of a cause, rather gives an opening to that evidence and reason which ought to decide it, than such a full examination and thorough discussion, as should always precede a final judgment, in causes of national consequence. A detail of reasons might be added, which I deem it unnecessary to enlarge on here.

The supreme authority ought to have a power of peace and war, and forming treaties and alliances with all foreign powers; which implies a necessity of their also having sufficient powers to enforce the obedience of all subjects of the United States to such treaties and alliances; with full powers to unite the force of the States; and direct its operations in war; and to punish all transgressors in all these respects;

otherwise, by the imprudence of a few, the whole Commonwealth may be embroiled with foreign powers, and the operations of war may be rendered useless, or fail much of their due effect.

All these I conceive will be easily granted, especially the latter, as the power of Congress to appoint and direct the army and navy in war, with all departments thereto belonging, and punishing delinquents in them all, is already admitted into practice in the course of the present unhappy war, in which we have been long engaged.

IV. But now the great and most difficult part of this weighty subject remains to be considered, viz., how these supreme powers are to be constituted in such manner that they may be able to exercise with full force and effect, the vast authorities committed to them, for the good and well-being of the United States, and yet be so checked and restrained from exercising them to the injury and ruin of the States, that we may with safety trust them with a commission of such vast magnitude — and may Almighty wisdom direct my pen in this arduous discussion.

1. The men who compose this important council, must be delegated from all the States; and, of course, the hope of approbation and continuance of honors, will naturally stimulate them to act rightly, and to please; the dread of censure and disgrace will naturally operate as a check to restrain them from improper behavior: but however natural and forcible these motives may be, we find by sad experience, they are not always strong enough to produce the effects we expect and wish from them.

It is to be wished that none might be appointed that were not fit and adequate to this weighty business; but a little knowledge of human nature, and a little acquaintance with the political history of mankind, will soon teach us that this is not to be expected.

The representatives appointed by popular elections are commonly not only the legal, but real, substantial representatives of their electors, *i.e.*, there will commonly be about the

same proportion of grave, sound, well-qualified men, trifling, desultory men — wild or knavish schemers — and dull, ignorant fools, in the delegated assembly, as in the body of electors.

I know of no way to help this; such delegates must be admitted, as the States are pleased to send; and all that can be done is, when they get together, to make the best of them.

We will suppose then they are all met in Congress, clothed with that vast authority which is necessary to the well-being, and even existence, of the union, that they should be vested with; how shall we empower them to do all necessary and effectual good, and restrain them from doing hurt? To do this properly, I think we must recur to those natural motives of action, those feelings and apprehensions, which usually occur to the mind at the very time of action; for distant consequences, however weighty, are often too much disregarded.

Truth loves light, and is vindicated by it. Wrong shrouds itself in darkness, and is supported by delusion. An honest well-qualified man loves light, can bear close examination, and critical inquiry, and is best pleased when he is most thoroughly understood: a man of corrupt design, or a fool of no design, hates close examination and critical inquiry; the knavery of the one, and the ignorance of the other, are discovered by it, and they both usually grow uneasy, before the investigation is half done. I do not believe that there is a more natural truth in the world, than that divine one of our Saviour, "he that doth truth, cometh to the light." I would therefore recommend that mode of deliberation, which will naturally bring on the most thorough and critical discussion of the subject, previous to passing any act; and for that purpose humbly propose,

2. That the Congress shall consist of two chambers, an upper and a lower house, or senate and commons, with the concurrence of both necessary to every act; and that every State send one or more delegates to each house: this will subject every act to two discussions before two distinct chambers of men equally qualified for the debate, equally masters of the subject, and of equal authority in the decision.

These two houses will be governed by the same natural motives and interests, viz., the good of the Commonwealth, and the approbation of the people. Whilst at the same time, the emulation naturally arising between them, will induce a very critical and sharp-sighted inspection into the motions of each other. Their different opinions will bring on conferences between the two houses, in which the whole subject will be exhausted in arguments pro and con, and shame will be the portion of obstinate, convicted error.

Under these circumstances, a man of ignorance or evil design will be afraid to impose on the credulity, inattention, or confidence of his house, by introducing any corrupt or indigested proposition, which he knows he must be called on to defend against the severe scrutiny and poignant objections of the other house. I do not believe the many hurtful and foolish legislative acts which first or last have injured all the States on earth, have originated so much in corruption as indolence, ignorance, and a want of a full comprehension of the subject, which a full, prying and emulous discussion would tend in a great measure to remove: this naturally rouses the lazy and idle, who hate the pain of close thinking; animates the ambitious to excel in policy and argument; and excites the whole to support the dignity of their house, and vindicate their own propositions.

I am not of opinion that bodies of elective men, which usually compose Parliaments, Diets, Assemblies, Congresses, etc., are commonly dishonest: but I believe it rarely happens that there are not designing men among them; and I think it would be much more difficult for them to unite their partisans in two houses, and corrupt or deceive them both, than to carry on their designs where there is but one unalarmed, unapprehensive house to be managed; and as there is no hope of making these bad men good, the best policy is to embarrass them, and make their work as difficult as possible.

In these assemblies are frequently to be found sanguine men, upright enough indeed, but of strong, wild projection, whose brains are always teeming with Utopian, chimerical

plans, and political whims, very destructive to society. I hardly know a greater evil than to have the supreme council of a Nation played off on such men's wires; such baseless visions at best end in darkness, and the dance, though easy and merry enough at first, rarely fails to plunge the credulous, simple followers into sloughs and bogs at last.

Nothing can tend more effectually to obviate these evils, and to mortify and cure such maggoty brains, than to see the absurdity of their projects exposed by the several arguments and keen satire which a full, emulous, and spirited discussion of the subject will naturally produce: we have had enough of these geniuses in the short course of our politics, both in our national and provincial councils, and have felt enough of their evil effects, to induce us to wish for any good method to keep ourselves clear of them in future.

The consultations and decisions of national councils are so very important, that the fate of millions depends on them, therefore no man ought to speak in such assemblies, without considering that the fate of millions hangs on his tongue, — and of course a man can have no right in such august councils to utter indigested sentiments, or indulge himself in sudden, unexamined flights of thought; his most tried and improved abilities are due to the State, who have trusted him with their most important interests.

A man must therefore be most inexcusable, who is either absent during such debates, or sleeps, or whispers, or catches flies during the argument, and just rouses when the vote is called, to give his yea or nay, to the weal or woe of a nation. Therefore it is manifestly proper, that every natural motive that can operate on his understanding, or his passions, to engage his attention and utmost efforts, should be put in practice, and that his present feelings should be raised by every motive of honor and shame, to stimulate him to every practicable degree of diligence and exertion, to be as far as possible useful in the great discussion.

I appeal to the feelings of every reader, if he would not (were he in either house) be much more strongly and naturally

induced to exert his utmost abilities and attention to any question which was to pass through the ordeal of a spirited discussion of another house, than he would do, if the absolute decision depended on his own house, without any further inquiry or challenge on the subject.

As Congress will ever be composed of men delegated by the several States, it may well be supposed that they have the confidence of their several States, and understand well the policy and present condition of them; it may also be supposed that they come with strong local attachments, and habits of thinking limited to the interests of their particular States; it may therefore be supposed they will need much information, in order to their gaining that enlargement of ideas, and great comprehension of thought, which will be necessary to enable them to think properly on that large scale, which takes into view the interests of all the States.

The greatest care and wisdom is therefore requisite to give them the best and surest information, and of that kind that may be the most safely relied on, to prevent their being deluded or prejudiced by partial representations, made by interested men who have particular views.

This information may perhaps be best made by the great ministers of state, who ought to be men of the greatest abilities and integrity; their business is confined to their several departments, and their attention engaged strongly and constantly to all the several parts of the same; the whole arrangement, method, and order of which, are formed, superintended, and managed in their offices, and all information relative to their department centre there.

These ministers will of course have the best information, and most perfect knowledge, of the state of the Nation, as far as it relates to their several departments, and will of course be able to give the best information to Congress, in what manner any bill proposed will affect the public interest in their several departments, which will nearly comprehend the whole.

The Financiers manage the whole subject of revenues and expenditures — the Secretary of State takes knowledge of

the general policy and internal government — the minister of war presides in the whole business of war and defence — and the minister of foreign affairs regards the whole state of the nation, as it stands related to, or connected with, all foreign powers.

I mention a Secretary of State, because all other nations have one, and I suppose we shall need one as much as they, and the multiplicity of affairs which naturally fall into his office will grow so fast, that I imagine we shall soon be under the necessity of appointing one.

To these I would add Judges of Law, and Chancery; but I fear they will not be very soon appointed — the one supposes the existence of law, the other of equity — and when we shall be altogether convinced of the absolute necessity of the real and effectual existence of both of these, we shall probably appoint proper heads to preside in those departments. I would therefore propose,

3. That when any bill shall pass the second reading in the house in which it originates, and before it shall be finally enacted, copies of it shall be sent to each of the said ministers of state, in being at the time, who shall give said house in writing, the fullest information in their power, and their most explicit sentiments of the operation of the said bill on the public interest, as far as relates to their respective departments, which shall be received and read in said house, and entered on their minutes, before they finally pass the bill; and when they send the bill for concurrence to the other house, they shall send therewith the said informations of the said ministers of state, which shall likewise be read in that house before their concurrence is finally passed.

I do not mean to give these great ministers of state a negative on Congress, but I mean to oblige Congress to receive their advices before they pass their bills, and that every act shall be void that is not passed with these forms; and I further propose, that either house of Congress may, if they please, admit the said ministers to be present and assist in the debates of the house, but without any right of vote in the decision.

It appears to me that if every act shall pass so many different corps of discussion before it is completed, where each of them stake their characters on the advice or vote they give, there will be all the light thrown on the case, which the nature and circumstances of it can admit, and any corrupt man will find it extremely difficult to foist in any erroneous clause whatever; and every ignorant or lazy man will find the strongest inducements to make himself master of the subject, that he may appear with some tolerable degree of character in it; and the whole will find themselves in a manner compelled, diligently and sincerely to seek for the real state of the facts, and the natural fitness and truths arising from them, *i.e.*, the whole natural principles on which the subject depends, and which alone can endure every test, to the end that they may have not only the inward satisfaction of acting properly and usefully for the States, but also the credit and character which is or ought ever to be annexed to such a conduct.

This will give the great laws of Congress the highest probability, presumption, and means of right, fitness, and truth, that any laws whatever can have at their first enaction and will of course afford the highest reason for the confidence and acquiescence of the States, and all their subjects, in them; and being grounded in truth and natural fitness, their operations will be easy, salutary, and satisfactory.

If experience shall discover error in any law (for practice will certainly discover such errors, if there be any) the legislature will always be able to correct them, by such repeals, amendments, or new laws as shall be found necessary; but as it is much easier to prevent mischiefs than to remedy them, all possible caution, prudence, and attention should be used, to make the laws right at first.

4. There is another body of men among us, whose business of life, and whose full and extensive intelligence, foreign and domestic, naturally make them more perfectly acquainted with the sources of our wealth, and whose particular interests are more intimately and necessarily connected with the general prosperity of the country, than any other order of

men in the States. I mean the Merchants; and I could wish that Congress might have the benefit of that extensive and important information, which this body of men are very capable of laying before them.

Trade is of such essential importance to our interests, and so intimately connected with all our staples, great and small, that no sources of our wealth can flourish, and operate to the general benefit of the community, without it. Our husbandry, that great staple of our country, can never exceed our home consumption without this — it is plain at first sight, that the farmer will not toil and sweat through the year to raise great plenty of the produce of the soil, if there is no market for his produce, when he has it ready for sale, *i.e.*, if there are no merchants to buy it.

In like manner, the manufacturer will not lay out his business on any large scale, if there is no merchant to buy his fabrics when he has finished them; a vent is of the most essential importance to every manufacturing country — the merchants, therefore, become the natural negotiators of the wealth of the country, who take off the abundance, and supply the wants, of the inhabitants; — and as this negotiation is the business of their lives, and the source of their own wealth, they of course become better acquainted with both our abundance and wants, and are more interested in finding and improving the best vent for the one, and supply of the other, than any other men among us, and they have a natural interest in making both the purchase and supply as convenient to their customers as possible, that they may secure their custom, and thereby increase their own business.

It follows then, that the merchants are not only qualified to give the fullest and most important information to our supreme legislature, concerning the state of our trade — the abundance and wants — the wealth and poverty, of our people, *i.e.*, their most important interests, but are also the most likely to do it fairly and truly, and to forward with their influence, every measure which will operate to the convenience and benefit of our commerce, and oppose with their whole

weight and superior knowledge of the subject, any wild schemes, which an ignorant or arbitrary legislature may attempt to introduce, to the hurt and embarrassment of our intercourse both with one another, and with foreigners.

The States of Venice and Holland have ever been governed by merchants, or at least their policy has ever been under the great influence of that sort of men. No States have been better served, as appears by their great success, the ease and happiness of their citizens, as well as the strength and riches of their Commonwealths: the one is the oldest, and the other the richest, State in the world of equal number of people — the one has maintained sundry wars with the Grand Turk — the other has withstood the power of Spain and France; and the capitals of both have long been the principal marts of the several parts of Europe in which they are situated; and the banks of both are the best supported, and in the best credit, of any banks in Europe, though their countries or territories are very small, and their inhabitants but a handful, when compared with the great States in their neighborhood.

Merchants must, from the nature of their business, certainly understand the interests and resources of their country, the best of any men in it; and I know not of any one reason why they should be deemed less upright or patriotic, than any other rank of citizen whatever.

I therefore humbly propose, if the merchants in the several States are disposed to send delegates from their body, to meet and attend the sitting of Congress, that they shall be permitted to form a chamber of commerce, and their advice to Congress be demanded and admitted concerning all bills before Congress, as far as the same may affect the trade of the States.

I have no idea that the continent is made for Congress: I take them to be no more than the upper servants of the great political body, who are to find out things by study and inquiry as other people do; and therefore I think it necessary to place them under the best possible advantages for information, and to require them to improve all those advantages, to qualify

themselves in the best manner possible, for the wise and useful discharge of the vast trust and mighty authority reposed in them; and as I conceive the advice of the merchants to be one of the greatest sources of mercantile information, which is anywhere placed within their reach, it ought by no means to be neglected, but so husbanded and improved, that the greatest possible advantages may be derived from it.

Besides this, I have another reason why the merchants ought to be consulted; I take it to be very plain that the husbandry and manufactures of the country must be ruined, if the present rate of taxes is continued on them much longer, and of course a very great part of our revenue must arise from imposts on merchandise, which will fall directly within the merchants' sphere of business, and of course their concurrence and advice will be of the utmost consequence, not only to direct the properest mode of levying those duties, but also to get them carried into quiet and peaceable execution.

No men are more conversant with the citizens, or more intimately connected with their interests, than the merchants, and therefore their weight and influence will have a mighty effect on the minds of the people. I do not recollect an instance, in which the Court of London ever rejected the remonstrances and advices of the merchants, and did not suffer severely for their pride. We have some striking instances of this in the disregarded advices and remonstrances of very many English merchants against the American war, and their fears and apprehensions we see verified, almost like prophecies by the event.

I know not why I should continue this argument any longer or indeed why I should have urged it so long, in as much as I cannot conceive that Congress or anybody else will deem it below the dignity of the supreme power to consult so important an order of men, in matters of the first consequence, which fall immediately under their notice, and in which their experience, and of course their knowledge and advice, are preferable to those of any other order of men.

Besides the benefits which Congress may receive from this

institution, a chamber of commerce, composed of members from all trading towns in the States, if properly instituted and conducted, will produce very many, I might almost say, innumerable advantages of singular utility to all the States — it will give dignity, uniformity, and safety to our trade — establish the credit of the bank — secure the confidence of foreign merchants — prove in very many instances a fruitful source of improvement of our staples and mutual intercourse — correct many abuses — pacify discontents — unite us in our interests, and thereby cement the general union of the whole Commonwealth — will relieve Congress from the pain and trouble of deciding many intricate questions of trade which they do not understand, by referring them over to this chamber, where they will be discussed by an order of men, the most competent to the business of any that can be found, and most likely to give a decision that shall be just, useful, and satisfactory.

It may be objected to all this, that the less complex and the more simple every constitution is, the nearer it comes to perfection: this argument would be very good, and afford a very forcible conclusion, if the government of men was like that of the Almighty, always founded on wisdom, knowledge and truth; but in the present imperfect state of human nature, where the best of men know but in part, and must recur to advice and information for the rest, it certainly becomes necessary to form a constitution on such principles, as will secure that information and advice in the best and surest manner possible.

It may be further objected that the forms herein proposed will embarrass the business of Congress, and make it at best slow and dilatory. As far as this form will prevent the hurrying a bill through the house without due examination, the objection itself becomes an advantage — at most these checks on the supreme authority can have no further effect than to delay or destroy a good bill, but cannot pass a bad one; and I think it much better in the main, to lose a good bill than to suffer a bad one to pass into a law. — Besides it is not to be supposed

that clear, plain cases will meet with embarrassment, and it is most safe that untried, doubtful, difficult matters should pass through the gravest and fullest discussion, before the sanction of the law is given to them.

But what is to be done if the two houses grow jealous and ill-natured, and after all their information and advice, grow out of humor and insincere, and no concurrence can be obtained? I answer, sit still and do nothing until they get into a better humor: I think this is much better than to pass laws in such a temper and spirit, as the objection supposes.

It is, however, an ill compliment to so many grave personages, to suppose them capable of throwing aside their reason, and giving themselves up like children to the control of their passions; or, if this should happen for a moment, that it should continue any length of time, is hardly to be presumed of a body of men placed in such high stations of dignity and importance, with the eyes of all the world upon them — but if they should, after all, be capable of this, I think it madness to set them to making laws, during such fits — it is best, when they are in no condition to do good, to keep them from doing hurt — and if they do not grow wiser in reasonable time, I know of nothing better, than to be ashamed of our old appointments, and make new ones.

But what if the country is invaded, or some other exigency happens, so pressing that the safety of the State requires an immediate resolution? I answer, what would you do if such a case should happen, where there was but one house, unchecked, but equally divided, so that a legal vote could not be obtained. The matter is certainly equally difficult and embarrassed in both cases: but in the case proposed I know of no better way than that which the Romans adopted on the like occasion, viz., that both houses meet in one chamber, and choose a dictator, who should have and exercise the whole power of both houses, till such time as they should be able to concur in displacing him, and that the whole power of the two houses should be suspended in the meantime.

5. I further propose, that no grant of money whatever

shall be made, without an appropriation, and that rigid penalties (no matter how great, in my opinion the halter would be mild enough) shall be inflicted on any person, however august his station, who should give order, or vote for the payment, or actually pay one shilling of such money to any other purpose than that of its appropriation, and that no order whatever of any superior in office shall justify such payment, but every order shall express what funds it is drawn upon, and what appropriation it is to be charged to, or the order shall not be paid.

This kind of embezzlement is of so fatal a nature, that no measures or bounds are to be observed in curing it; when ministers will set forth the most specious and necessary occasions for money, and induce the people to pay it in full tale; and when they have gotten possession of it, to neglect the great objects for which it was given, and pay it, sometimes squander it away, for different purposes, oftentimes for useless, yea, hurtful ones, yea, often even to bribe and corrupt the very officers of government, to betray their trust, and contaminate the State, even in its public offices — to force people to buy their own destruction, and pay for it with their hard labor, the very sweat of their brow, is a crime of so high a nature, that I know not any gibbet too cruel for such offenders.

6. I would further propose, that the aforesaid great ministers of state shall compose a Council of State, to whose number Congress may add three others, viz., one from New England, one from the middle States, and one from the southern States, one of which to be appointed President by Congress; to all of whom shall be committed the supreme executive authority of the States (all and singular of them ever accountable to Congress) who shall superintend all the executive departments, and appoint all executive officers, who shall ever be accountable to, and removable for just cause by, them or Congress, *i.e.*, either of them.

7. I propose further, that the powers of Congress, and all the other departments, acting under them, shall all be restricted to such matters only of general necessity and utility

to all the States, as cannot come within the jurisdiction of any particular State, or to which the authority of any particular State is not competent: so that each particular State shall enjoy all sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress, for the purposes of the general union.

There remains one very important article still to be discussed, viz., what methods the Constitution shall point out, to enforce the acts and requisitions of Congress through the several States; and how the States which refuse or delay obedience to such acts and requisitions, shall be treated: this, I know, is a particular of the greatest delicacy, as well as of the utmost importance; and therefore, I think, ought to be decidedly settled by the Constitution, in our coolest hours, whilst no passions or prejudices exist, which may be excited by the great interests or strong circumstances of any particular case which may happen.

I know that supreme authorities are liable to err, as well as subordinate ones. I know that courts may be in the wrong, as well as the people; such is the imperfect state of human nature in all ranks and degrees of men; but we must take human nature as it is; it cannot be mended; and we are compelled both by wisdom and necessity, to adopt such methods as promise the greatest attainable good, though perhaps not the greatest possible, and such as are liable to the fewest inconveniences, though not altogether free of them.

This is a question of such magnitude, that I think it necessary to premise the great natural principles on which its decision ought to depend. In the present state of human nature, all human life is a life of chances; it is impossible to make any interest so certain, but there will be a chance against it; and we are in all cases obliged to adopt a chance against us, in order to bring ourselves within the benefit of a greater chance in our favor; and that calculation of chances which is grounded on the great natural principles of truth and fitness, is of all others the most likely to come out right.

1. No laws of any State whatever, which do not carry in them a force which extends to their effectual and final execution, can afford a certain or sufficient security to the subject: this is too plain to need any proof.

2. Laws or ordinances of any kind (especially of august bodies of high dignity and consequence), which fail of execution, are much worse than none; they weaken the government; expose it to contempt; destroy the confidence of all men, natives and foreigners, in it; and expose both aggregate bodies and individuals, who have placed confidence in it, to many ruinous disappointments, which they would have escaped, had no law or ordinance been made: therefore,

3. To appoint a Congress with powers to do all acts necessary for the support and uses of the union; and at the same time to leave all the States at liberty to obey them or not with impunity, is, in every view, the grossest absurdity, worse than a state of nature without any supreme authority at all, and at best a ridiculous effort of childish nonsense: and of course,

4. Every State in the Union is under the highest obligation to obey the supreme authority of the whole, and in the highest degree amenable to it, and subject to the highest censure for disobedience. Yet all this notwithstanding, I think the soul that sins shall die, *i.e.*, the censure of the great supreme power, ought to be so directed, if possible, as to light on those persons, who have betrayed their country, and exposed it to dissolution, by opposing and rejecting that supreme authority, which is the band of our union, and from whence proceeds the principal strength and energy of our government.

I therefore propose, that every person whatever, whether in public or private character, who shall, by public vote or overt act, disobey the supreme authority, shall be amenable to Congress, shall be summoned and compelled to appear before Congress, and, on due conviction, suffer such fine, imprisonment, or other punishment, as the supreme authority shall judge requisite.

It may be objected here, that this will make a Member of

Assembly accountable to Congress for his vote in Assembly; I answer, it does so in this only case, viz., when that vote is to disobey the supreme authority; no Member of Assembly can have right to give such a vote, and therefore ought to be punished for so doing. When the supreme authority is disobeyed, the government must lose its energy and effect, and of course the Empire must be shaken to its very foundation.

A government which is but half executed, or whose operations may all be stopped by a single vote, is the most dangerous of all institutions. — See the present Poland, and ancient Greece buried in ruins, in consequence of this fatal error in their policy. A government which has not energy and effect, can never afford protection or security to its subjects, *i.e.*, must ever be ineffectual to its own ends.

I cannot therefore admit, that the great ends of our Union should lie at the mercy of a single State, or that the energy of our government should be checked by a single disobedience, or that such disobedience should ever be sheltered from censure and punishment; the consequence is too capital, too fatal to be admitted. Even though I know very well that a supreme authority, with all its dignity and importance, is subject to passions like other lesser powers, that they may be and often are heated, violent, oppressive, and very tyrannical; yet I know also, that perfection is not to be hoped for in this life, and we must take all institutions with their natural defects, or reject them altogether: I will guard against these abuses of power as far as possible, but I cannot give up all government, or destroy its necessary energy, for fear of these abuses.

But to fence them out as far as possible, and to give the States as great a check on the supreme authority, as can consist with its necessary energy and effect,

I propose that any State may petition Congress to repeal any law or decision which they have made, and if more than half the States do this, the law or decision shall be repealed, let its nature or importance be however great, excepting only such acts as create funds for the public credit, which

shall never be repealed till their end is effected, or other funds equally effectual are substituted in their place; but Congress shall not be obliged to repeal any of these acts, so petitioned against, till they have time to lay the reasons of such acts before such petitioning States, and to receive their answer; because such petitions may arise from sudden heats, popular prejudices, or the publication of matters false in fact, and may require time and means of cool reflection and the fullest information, before the final decision is made: but if after all more than half of the States persist in their demand of a repeal, it shall take place.

The reason is, the uneasiness of a majority of States affords a strong presumption that the act is wrong, for uneasiness arises much more frequently from wrong than right; but if the act was good and right, it would still be better to repeal and lose it, than to force the execution of it against the opinion of a major part of the States; and lastly, if every act of Congress is subject to this repeal, Congress itself will have stronger inducement not only to examine well the several acts under their consideration, but also to communicate the reasons of them to the States, than they would have if their simple vote gave the final stamp of irrevocable authority to their acts.

Further I propose, that if the execution of any act or order of the supreme authority shall be opposed by force in any of the States (which God forbid) it shall be lawful for Congress to send into such State a sufficient force to suppress it.

On the whole, I take it that the very existence and use of our union essentially depends on the full energy and final effect of the laws made to support it; and therefore I sacrifice all other considerations to this energy and effect, and if our Union is not worth this purchase, we must give it up — the nature of the thing does not admit of any other alternative.

I do contend that our Union is worth this purchase — with it, every individual rests secure under its protection against foreign or domestic insult and oppression — without it, we can have no security against the oppression, insult, and invasion of foreign powers; for no single State is of

importance enough to be an object of treaty with them, nor, if it was, could it bear the expense of such treaties, or support any character or respect in a dissevered state, but must lose all respectability among the nations abroad.

We have a very extensive trade, which cannot be carried on with security and advantage, without treaties of commerce and alliance with foreign nations.

We have an extensive western territory which cannot otherwise be defended against the invasion of foreign nations, bordering on our frontiers, who will cover it with their own inhabitants, and we shall lose it forever, and our extent of empire be thereby restrained; and what is worse, their numerous posterity will in future time drive ours into the sea, as the Goths and Vandals formerly conquered the Romans in like circumstances, unless we have the force of the union to repel such invasions. We have, without the union, no security against the inroads and wars of one State upon another, by which our wealth and strength, as well as ease and comfort, will be devoured by enemies growing out of our own bowels.

I conclude then, that our union is not only of the most essential consequence to the well-being of the States in general but to that of every individual citizen of them, and of course ought to be supported, and made as useful and safe as possible, by a Constitution which admits that full energy and final effect of government which alone can secure its great ends and uses.

In a dissertation of this sort, I would not wish to descend to minutiae, yet there are some small matters which have important consequences, and therefore ought to be noticed. It is necessary that Congress should have all usual and necessary powers of self-preservation and order, *e.g.*, to imprison for contempt, insult, or interruption, etc., and to expel their own members for due causes, among which I would rank that of non-attendance on the house, or partial attendance without such excuse as shall satisfy the house.

Where there is such vast authority and trust devolved on Congress, and the grand and most important interests

of the Empire rest on their decisions, it appears to me highly unreasonable that we should suffer their august consultations to be suspended, or their dignity, authority, and influence lessened by the idleness, neglect, and non-attendance of its members; for we know that the acts of a thin house do not usually carry with them the same degree of weight and respect as those of a full house.

Besides I think, when a man is deputed a delegate in Congress, and has undertaken the business, the whole Empire becomes of course possessed of a right to his best and constant services, which if any member refuses or neglects, the Empire is injured and ought to resent the injury, at least so far as to expel and send him home, that so his place may be better supplied.

I have one argument in favor of my whole plan, viz., it is so formed that no men of dull intellects, or small knowledge, or of habits too idle for constant attendance, or close and steady attention, can do the business with any tolerable degree of respectability, nor can they find either honor, profit, or satisfaction in being there, and of course, I could wish that the choice of the electors might never fall on such a man, or if it should, that he might have sense enough (of pain at least, if not of shame) to decline his acceptance.

For after all that can be done, I do not think that a good administration depends wholly on a good Constitution and good laws, for insufficient or bad men will always make bad work, and a bad administration, let the Constitution and laws be ever so good; the management of able, faithful, and upright men alone can cause an administration to brighten, and the dignity and wisdom of an Empire to rise into respect; make truth the line and measure of public decision; give weight and authority to the government, and security and peace to the subject.

We now hope that we are on the close of a war of mighty effort and great distress, against the greatest power on earth, whetted into the most keen resentment and savage fierceness, which can be excited by wounded pride, and which usually

rises higher between brother and brother offended, than between strangers in contest. Twelve of the Thirteen United States have felt the actual and cruel invasions of the enemy, and eleven of our capitals have been under their power, first or last, during the dreadful conflict; but a good Providence, our own virtue and firmness, and the help of our friends, have enabled us to rise superior to all the power of our adversaries, and made them seek to be at peace with us.

During the extreme pressures of the war, indeed many errors in our administration have been committed, when we could not have experience and time for reflection, to make us wise; but these will easily be excused, forgiven, and forgotten, if we can now, while at leisure, find virtue, wisdom, and foresight enough to correct them, and form such establishments, as shall secure the great ends of our union, and give dignity, force, utility, and permanency to our Empire.

It is a pity we should lose the honor and blessings which have cost us so dear, for want of wisdom and firmness, in measures, which are essential to our preservation. It is now at our option, either to fall back into our original atoms, or form such an union, as shall command the respect of the world, and give honor and security to our people.

This vast subject lies with mighty weight on my mind, and I have bestowed on it my utmost attention, and here offer the public the best thoughts and sentiments I am master of. I have confined myself in this dissertation entirely to the nature, reason, and truth of my subject, without once adverting to the reception it might meet with from men of different prejudices or interests. To find the truth, not to carry a point, has been my object.

I have not the vanity to imagine that my sentiments may be adopted; I shall have all the reward I wish or expect, if my dissertation shall throw any light on the great subject, shall excite an emulation of inquiry, and animate some abler genius to form a plan of greater perfection, less objectionable, and more useful.

NOTES APPENDED BY PELATIAH WEBSTER TO THE
REPUBLICATION MADE AT PHILADELPHIA IN 1791

NOTE 1

Forming a plan of confederation, or a system of general government of the United States, engrossed the attention of Congress from the Declaration of Independence, July 4, 1776, till the same was completed by Congress, July 9, 1778, and recommended to the several States for ratification, which finally took place, March 1, 1781; from which time the said confederation was considered as the grand constitution of the general government, and the whole administration was conformed to it.

And as it had stood the test of discussion in Congress for two years, before they completed and adopted it, and in all the States for three years more, before it was finally ratified, one would have thought that it must have been a very finished and perfect plan of government.

But on trial of it in practice, it was found to be extremely weak, defective, totally inefficient, and altogether inadequate to its great ends and purposes. For,

1. It blended the legislative and executive powers together in one body.

2. This body, viz., Congress, consisted of but one house, without any check upon their resolutions.

3. The powers of Congress in very few instances were definitive and final; in the most important articles of government they could do no more than recommend to the several States; the consent of every one of which was necessary to give legal sanction to any act so recommended.

4. They could assess and levy no taxes.

5. They could institute and execute no punishments, except in the military department.

6. They had no power of deciding or controlling the contentions and disputes of different States with each other.

7. They could not regulate the general trade: or,

8. Even make laws to secure either public treaties with foreign States, or the persons of public ambassadors, or to punish violations or injuries done to either of them.

9. They could institute no general judiciary powers.

10. They could regulate no public roads, canals, or inland navigation, etc., etc., etc.

And what caps all the rest was, that (whilst under such an inefficient political constitution, the only chance we had of any tolerable administration lay wholly in the prudence and wisdom of the men who happened to take the lead in our public councils) it was fatally provided by the absurd doctrine of rotation, that if any Member of Congress by three years' experience and application, had qualified himself to manage our public affairs with consistency and fitness, that he should be constitutionally and absolutely rendered incapable of serving any longer, till by three years' discontinuance, he had pretty well lost the cue or train of the public counsels, and forgot the ideas and plans which made his service useful and important; and, in the mean time, his place should be supplied by a fresh man, who had the whole matter to learn, and when he had learned it, was to give place to another fresh man; and so on to the end of the chapter.

The sensible mind of the United States, by long experience of the fatal mischiefs of anarchy, or (which is about the same thing) of this ridiculous, inefficient form of government, began to apprehend that there was something wrong in our policy, which ought to be redressed and mended; but nobody undertook to delineate the necessary amendments.

I was then pretty much at leisure, and was fully of opinion (though the sentiment at that time would not very well bear) that it would be ten times easier to form a new constitution than to mend the old one. I therefore sat myself down to sketch out the leading principles of that political constitution, which I thought necessary to the preservation and happiness of the United States of America, which are comprised in this Dissertation.

I hope the reader will please to consider, that these are

the original thoughts of a private individual, dictated by the nature of the subject only, long before the important theme became the great object of discussion, in the most dignified and important assembly, which ever sat or decided in America.

NOTE 2

At the time when this Dissertation was written (Feb. 16, 1783) the defects and insufficiency of the Old Federal Constitution were universally felt and acknowledged; it was manifest, not only that the internal police, justice, security, and peace of the States could never be preserved under it, but the finances and public credit would necessarily become so embarrassed, precarious, and void of support, that no public movement, which depended on the revenue, could be managed with any effectual certainty: but though the public mind was under full conviction of all these mischiefs, and was contemplating a remedy, yet the public ideas were not at all concentrated, much less arranged into any new system or form of government, which would obviate these evils. Under these circumstances, I offered this Dissertation to the public: how far the principles of it were adopted or rejected in the New Constitution, which was four years afterwards (Sept. 17, 1787) formed by the General Convention, and since ratified by all the States, is obvious to every one.

I wish here to remark the great particulars of my plan which were rejected by the Convention.

1. My plan was to keep the legislative and executive departments entirely distinct; the one to consist of the two houses of Congress, the other to rest entirely in the Grand Council of State.

2. I proposed to introduce a Chamber of Commerce, to consist of merchants, who should be consulted by the legislature in all matters of trade and revenue, and which should have the conducting the revenue committed to them.

The first of these the Convention qualified; the second they say nothing of, *i.e.*, take no notice of it.

3. I proposed that the great officers of state should have

the perusal of all bills, before they were enacted into laws, and should be required to give their opinion of them, as far as they affected the public interest in their several departments; which report of them Congress should cause to be read in their respective houses, and entered on their minutes. This is passed over without notice.

4. I proposed that all public officers appointed by the executive authority, should be amenable both to them and to the legislative power, and removable for just cause by either of them. This is qualified by the Convention.

And in as much as my sentiments in these respects were either qualified or totally neglected by the Convention, I suppose they were wrong; however, the whole matter is submitted to the politicians of the present age, and to our posterity in future.

In sundry other things, the Convention have gone into minutiae, *e.g.*, respecting elections of President, Senators, and Representatives in Congress, etc., which I proposed to leave at large to the wisdom and discretion of Congress, and of the several States.

Great reasons may doubtless be assigned for their decision, and perhaps some little ones for mine. Time, the great arbiter of all human plans, may, after a while, give his decision; but neither the Convention nor myself will probably live to feel either the exultation or mortification of his approbation or disapprobation of either of our plans.

But if any of these questions should in future time become objects of discussion, neither the vast dignity of the Convention, nor the low, unnoticed state of myself, will be at all considered in the debates; the merits of the matter, and the interests connected with or arising out of it, will alone dictate the decision.

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